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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 311. 67

EVA JANE WOLVERTON AND WILLIAM ARTHUR WOLVERTON, INFANT HEIRS OF THE LATE NELSON WOLVERTON, DECEASED, BY MARGARET J. WOLVERTON DANIELS, THEIR GUARDIAN AND NEXT FRIEND; AND MARGARET J. WOLVERTON DANIELS, PLAINTIFFS IN ERROR,

vs.

ERASTUS A. NICHOLS AND CHARLES O. FULLER.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

FILED OCTOBER 1, 1883.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 311.

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1 In the District Court of the Second Judicial District of the Territory of Montana in and for the County of Silver Bow.

EVA JANE WOLVERTON and WILLIAM ARTHUR WOLVERTON, Infant Heirs of the late Nelson Wolverton, Deceased, by Margaret J. Wolverton Daniels, their Guardian and next Friend, and Margaret J. Wolverton Daniels, Plaintiffs,

vs.

ERASTUS A. NICHOLS and CHARLES O. FULLER, Defendants.

You are hereby required to appear in an action brought against you by the above-named plaintiffs in the district court of the second judicial district of the Territory of Montana in and for the county of Silver Bow, and to answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons, if served within this county; or if served out
2 of this county but in this district, within twenty days, otherwise within forty days, or judgment by default will be taken against you according to the prayer of said complaint. The said action is brought to substantiate the plaintiffs and to determine the title, possession, and right to possession to be in plaintiffs to the following-described premises, to wit, situate in Independent Mining district, Silver Bow county, M. T., to wit: Those certain placer mining claims lying in, on, and along Silver Bow creek, and numbered 237 to 242, above discovery and each included, and for a full discription of which and for their boundaries reference is hereby had to the complaint on file in the said district court, and to debar defendants forever from setting up or asserting any claim to said premises, and that they be decreed to have no estate, title, or interest whatever in said premises by reason of their application in the U. S. land office for patent for the S. E. ¼ of the S. E. ¼ of sec.
3 23, in T. 3 N., R. 8 W., and that plaintiffs have a judgment for their costs. And you are hereby notified that if you fail to appear and answer said complaint, as above required, the said plaintiffs will take a default against you and apply to the court for the relief demanded in the prayer of plaintiffs' complaint.

Given under my hand and the seal of the district court of the second district of the Territory of Montana in and for the county of Silver Bow, this 14th day of September, in the year of our Lord one thousand eight hundred and eighty-one.

[District Court Seal.]

GEO. W. IRVINE II, *Clerk.*

OFFICE OF THE SHERIFF, SILVER BOW COUNTY, MONTANA TERRITORY.

I hereby certify that I received the within summons on the 14th day of September, A. D. 1881, and personally served the same on the 14th day of September, A. D. 1881, by delivering a true copy of the summons to Erastus A. Nichols and Charles O. Fuller, in
4 and near Butte City, in the county of Silver Bow, M. T., they being the defendants named in said summons.

Fourth. That plaintiffs have judgment against the defendants for the costs of this action, and for such other and further relief in the premises as to this honorable court may seem meet.

RANDOLPH AND DEWITT,
Plaintiffs' Att'ys, Butte, Montana.

10 TERRITORY OF MONTANA, } *ss:*
County of Silver Bow, }

Margaret J. Wolverton Daniels, being duly sworn, says that she is one of the above-named plaintiffs; that she has heard read the foregoing complaint and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters therein stated on information and belief, and that as to those matters she believes it to be true.

MARGARET J. DANIELS.

Subscribed and sworn to before me this 13th day of September, 1881.

WILLIAM H. DEWITT,
Notary Public, Montana.

Filed Sept. 14, 1881.

GEO. W. IRVINE II, *Clerk.*

And afterwards came the said defendants and filed in said action their demurrer to said plaintiffs' complaint in words & figures following, viz:

11 *Demurrer to Complaint.*

EVA J. WOLVERTON and WILLIAM ARTHUR WOLVERTON, Infant Heirs of the late Nelson Wolverton, Deceased, by Margaret J. Wolverton Daniels, their Guardian and next Friend, and Margaret J. Wolverton Daniels, Plaintiffs,

vs.

ERASTUS A. NICHOLS and CHARLES O. FULLER, Defendants.

And now come the above-named defendants, by their attorneys, Sanders & Cullen & W. O. Speer, and demur to the plaintiffs' complaint filed in the above-entitled cause for the following reasons:

1st. Said complaint shows that two of the above-named plaintiffs are infant heirs, and does not show that said heirs appear by guardian, as provided by statute, and that said minors have no legal capacity to sue, or that the above-named Margaret J. Wolverton Daniels is the guardian and next friend of said minors or infant heirs, &c.

12 2nd. That said complaint is ambiguous and unintelligible, in that it does not show that plaintiffs have any title to the property claimed in said complaint, and that said complaint does not show wherein defendants' title consists, or wherein the same conflicts with that of plaintiffs', and does not show that plaintiffs have any title whatever to said property.

3. That said complaint does not state facts sufficient to constitute a cause of action.

SANDERS & CULLEN &
W. O. SPEER,
For Defendants.

To Quiet Title.

In the District Court of the Second Judicial District of the Territory of Montana in and for the County of Silver Bow. September Term, 1881.

EVA J. WOLVERTON *et al.*
vs.
E. A. NICHOLS *et al.* } No. 114.

TUESDAY, *Oct.* 25—9 a. m.

Court convened pursuant to adjournment.

Present: The Hon. William J. Galbraith, pres. judge.

13 This day again come counsel for parties; and this cause having been heard on the demurrer of defendants to the complaint and taken under advisement by the court, and the court, being fully advised in the premises, is of the opinion that the said demurrer ought to be, and the same is hereby, overruled, and, by the stipulation and agreement of parties, defendants are granted a leave of thirty days to answer.

Answer to Complaint.

In the District Court of the Second Judicial District of Montana Territory in and for Silver Bow County.

EVA JANE WOLVERTON *et al.*, Plaintiffs,

vs.

ERASTUS A. NICHOLS and CHARLES O. FULLER, Defendants.

The above-named defendants answering the complaint on file herein—

Deny that the plaintiffs are the owners of, in the possession of, or entitled to the possession of the placer mining claims described
14 in plaintiffs' complaint, numbered two hundred and forty-three to two hundred and fifty, above discovery, each included, or any part or portion thereof.

Deny that plaintiffs or their grantors or any of them have been in the quiet and peaceable possession and enjoyment of same premises for a period exceeding five years, or for any length of time, or at all prior to the inception of defendants' title to a portion thereof.

Deny that the plaintiffs or any of them are now or ever have been in the possession of any portion of the ground described in the plaintiffs' complaint as being claimed by these defendants.

Deny that plaintiffs or either of them have or derived any title whatever to said ground by virtue of any placer mining locations made by plaintiffs' grantors in the year 1865, or at any other time.

Deny that plaintiffs or their grantors ever, at any time, located

TERRITORY OF MONTANA, } ss:
County of Silver Bow, }

Margaret J. W. Daniels, being duly sworn, says that she is one of the plaintiffs named in the above-entitled action; that she has heard read the foregoing replication and knows the contents thereof, and that the same is true of her own knowledge, except as to those matters therein stated on information and belief, and as to those matters she believes it to be true.

(Signed) ——— ———.

21 Subscribed and sworn to before me this — day of ——, A. D. 1881.

——— ———,
Notary Public, Montana.

TERRITORY OF MONTANA, } ss:
County of Silver Bow, }

George A. Randolph, being duly sworn, says that he is one of the attorneys of plaintiffs above named; that said attorneys have for three months endeavored to find plaintiff in order to obtain her verification to the foregoing replication and have been unable to do so; that he has read the foregoing replication, and that the facts stated therein are true to the best of his knowledge, information, and belief.

GEO. C. RANDOLPH.

Subscribed and sworn to before me this 27th day of Feb'y, 1882.

WILLIAM H. DEWITT,
Notary Public, Montana.

Filed Feb'y 27, 1882.

GEO. W. IRVINE, *Cl'k.*

22 *Motion for Nonsuit.*

In the District Court of the Second Judicial District of Montana Territory in and for Silver Bow County.

EVA J. WOLVERTON *et al. vs.* ERASTUS A. NICHOLS *et al.*

Now come defendants and move the court for a non-suit herein for the following reasons:

1. There is no proof in this action that plaintiffs were in the possession of the premises in conflict at the date of the commencement of this action.

2. There is no proof that plaintiffs have any title to the ground in conflict, for the reason that there is no proof as to where the second rise of the bed rock is located, and therefore the claims are not shown to include the ground in dispute, and for the further reason that plaintiffs have not connected themselves with the claims located and in dispute.

23 KNOWLES & FORBIS,
Att'ys for Def'ts.

Filed March 20, 1882,

GEO W. IRVINE, *Clerk.*

To Qui-t Title.

In the District Court of the Second Judicial District of the Territory of Montana in and for the County of Silver Bow. February Term, 1882.

EVA J. WOLVERTON *et al.*
vs.
E. A. NICHOLS *et al.* } No. 114.

TUESDAY, 31*st*—9 a. m.

Court convened pursuant to adjournment.
Present: The Hon. William J. Galbraith, presiding judge.

This day came counsel for plaintiffs and defendants, and this cause having been heretofore heard on defendants' motion for a non-suit herein, and the court being fully advised in the premises, it is hereby ordered and adjudged that the said motion be, and the same is hereby, sustained; and to which ruling of the court sustain-
24 ing said motion plaintiffs, by their counsel, except.

Motion to Set Aside Nonsuit.

Second Judicial District Court, County of Silver Bow, Montana Territory.

EVA J. WOLVERTON *et al. vs.* ERASTUS A. NICHOLS *et al.*

The plaintiffs move to set aside the non-suit in the above cause, and for permission to amend the complaint by adding the name of the Colorado and Montana Smelting Company as an additional party plaintiff in said cause, and an allegation setting forth the corporate character of said Colorado and Montana Smelting Company.
M'ch 21, 1882.

RANDOLPH & DEWITT,
Pl'ffs' Attorneys.

Filed M'ch 21, 1882.

GEO. W. IRVINE II, *Clerk.*

In the District Court of the Second Judicial District of the Territory of Montana in and for the County of Silver Bow. February Term, 1882.

EVA J. WOLVERTON *et al. vs.* ERASTUS A. NICHOLS *et al.*

25 TUESDAY, *Mar.* 21—9 a. m.

Court convened pursuant to adjournment.
Present: The Hon. William J. Galbraith, presiding judge.

Whereupon this cause is heard on plaintiffs' motion to set aside the ruling and order of the court sustaining said motion, and for leave to amend the complaint herein, and, the court being fully ad-

vised in the premises, the said motion is hereby overruled; and to which ruling of the court overruling said motion plaintiffs, by their counsel, except.

And whereupon it is ordered that the defendants herein have a judgment for their costs.

26 In the District Court of the Second Judicial District of Montana Territory in and for Silver Bow County.

EVA JANE WOLVERTON and WILLIAM ARTHUR WOLVERTON, Infant Heirs of the late Nelson Wolverton, Deceased, by Margaret J. Wolverton Daniels, their Guardian and next Friend, and Margaret J. Wolverton Daniels, Plaintiffs,

vs.

ERASTUS A. NICHOLS and CHARLES O. FULLER, Defendants.

This cause came regularly on for trial at the February, A. D. 1882, term of the above-named court upon the issues presented in the pleadings herein. A jury was empaneled to try the cause and evidence introduced on behalf of plaintiffs, and the plaintiffs rest their case. Whereupon the defendants moved the court for a nonsuit herein, which motion was granted by the court, and said cause dismissed; and it was ordered by the court that defendants have
27 judgment for their costs herein.

It is therefore ordered and adjudged that plaintiffs have no cause of action against said defendants herein, and that said plaintiffs have no right, title, or estate of, in or to the ground in conflict in said action and in said complaint described. And it is further ordered and adjudged that this action be dismissed, and that defendants have and recover of plaintiffs the costs of this action, amounting to ($57.50) fifty-seven and $\frac{50}{100}$ dollars.

GEO. W. IRVINE II, *Clerk.*

Filed Mar. 25, 1882.

GEO. W. IRVINE II, *Clerk.*

Notice of Appeal.

Second Judicial District Court, County of Silver Bow, Territory of Montana.

EVA J. WOLVERTON *et al.*, Plaintiffs,

vs.

ERASTUS A. NICHOLS *et al.*, Defendants.

28 SIRS: Please take notice that the plaintiffs in the above-entitled action hereby appeal to the supreme court of the Territory of Montana from the judgment in said action made and entered pursuant to an order granting anon suit in the district court in and for the county of Silver Bow, said Territory, on the 25th day of March, A. D. 1882, in favor of the defendants and against the plaintiffs in said action, and from the whole thereof.

Dated the 30th day of March, 1882.

RANDOLPH & DEWITT,
Attorneys for Plaintiffs.

To the clerk of said district court and to Messrs. Knowles & Forbis, attorneys for defendants.

Due service of the within is admitted.
March 30, 1882.

KNOWLES & FORBIS,
Atty's for Defendants.

Filed Mar. 30, 1882.

GEO. W. IRVINE II, *Clerk.*

29 *Undertaking on Appeal.*

Second Judicial District Court, County of Silver Bow, Territory of Montana.

EVA JANE WOLVERTON *et als.*, Plaintiffs,
vs.
ERASTUS A. NICHOLS *et al.*, Defendants.

Whereas the plaintiffs in the above-entitled action have appealed, or are about to appeal, to the supreme court of the Territory of Montana from a judgment made and entered in said action in favor of the defendants and against the plaintiffs, in the district court in and for the county of Silver Bow, Territory of Montana, on the 25th day of March, 1882, upon the decision of a motion for a nonsuit:

Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, residents and freeholders within the said county of Silver Bow, do hereby jointly and severally undertake and promise on the part of the appellants that the said appellants will pay all damages and costs which may be awarded against them on the
30 appeal, or on the dismissal thereof, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound. And whereas the appellants are desirous of staying the execution of the said judgment so appealed from, we do further, in consideration thereof and of the premises, jointly and severally undertake and promise, and do hereby acknowledge ourselves further jointly and severally bound in the further sum of four hundred dollars, being double the amount named in the said judgment as costs, that if the said judgment appealed from, or any part thereof be affirmed, or the appeal dismissed, the appellants shall pay the amount directed to be paid thereby or the part of the judgment which shall be affirmed, if affirmed only in part, and all damages and costs which shall be awarded against the appellants on the appeal.

Signed and sealed.

JAMES R. CLARK. [SEAL.]
H. L. FRANK. [SEAL.]

Dated the 30th day of March, 1882.

31 TERRITORY OF MONTANA, } ss:
County of Silver Bow, }

James R. Clark and H. L. Frank, being each duly sworn, says each for himself, and not one for the other, that he is one of the

persons described in and who executed the foregoing undertaking; that he is worth the amount specified therein over and above all his just debts and liabilities, exclusive of property exempt by the laws of the Territory of Montana from execution.

JAMES R. CLARK.
H. L. FRANK.

Subscribed and sworn to before me this 30th day of March, 1882.

WILLIAM H. DEWITT,
Notary Public, Montana.

Filed Mar. 30, 1882.

GEO. W. IRVINE II, *Clerk.*

Notice.

Second Judicial District Court, County of Silver Bow, Montana Territory.

32 EVA JANE WOLVERTON *et al.*, Plaintiffs,
vs.
ERASTUS A. NICHOLS *et al.*, Defendants.

GENTLEMEN: Please take notice that the plaintiffs above named have this day filed with the clerk of said court their statement on appeal of the above cause to the supreme court of said Territory.

Dated Butte, Mont., April 3, 1882.

RANDOLPH & DEWITT,
Plaintiffs' Attorneys.

To Messrs. Knowles & Forbis, def'ts' att'ys.

Due service of foregoing notice accepted and copy waived this 3rd day of April, 1882.

KNOWLES & FORBIS,
Att'ys for Def'ts.

Filed April 4, 1882.

GEO. W. IRVINE II *Clerk*,
By H. C. BODLEY, *Deputy.*

33 *Statement on Appeal. Specifiation of Errors.*

Second Judicial District Court, County of Silver Bow, Montano Territory.

EVA JANE WOLVERTON and WILLIAM ARTHUR WOLVERTON, Infant Heirs of the late Nelson Wolverton, deceased, by Margaret J. Wolverton Daniels, their Guardian and next Friend, and Margaret J. Wolverton Daniels, Plaintiffs,
vs.
ERASTUS A. NICHOLS and CHARLES O. FULLER, Defendants.

Randolph & DeWitt, pl'ffs' attorneys; Knowles & Forbis, def'ts' attorneys.

The plaintiffs and appellants in the above-entitled cause, upon the argument of the appeal thereof to the supreme court of the Territory of Montana, will rely upon the following grounds:

34 The court upon the trial of this cause erred in granting the motion of the defendants for a nonsuit for the following reasons:

1. Because plaintiffs on the trial had introduced sufficient evidence to entitle them to go to the jury, which evidence and the whole thereof is hereinafter set forth and follows these specifications, and is hereby made a part of this specification.

2. Because plaintiffs proved by their evidence introduced on the trial that they were in the possession of the premises in conflict at the date of the commencement of this action, which said evidence and the whole thereof is hereinafter set forth and follows the specifications, and is hereby made a part of this specification.

3. Because the plaintiffs proved by their evidence introduced on the trial all the material allegations set forth in the complaint, and for this reason were entiled to have the case submitted to the jury, which said evidence and the whole thereof is hereinafter set
35 forth and follows these specifications, and is hereby made a part of this specification.

4. Because the plaintiffs proved by their evidence introduced on the trial that they had the right of the possession of the premises in conflict at the date of the commencement of the action, which said evidence and the whole thereof is hereinafter set forth and follows these specifications, and is hereby made a part of this specification.

5. Because the plaintiffs proved by their evidence introduced upon the trial that they had preserved in themselves the title to the premises in conflict by a due observance of the laws, customs, rules, and regulations of the miners in the mining district where said premises are located, which said evidence and the whole thereof is hereinafter set forth and follows these specifications, and is hereby made a part of this specification.

6. Because plaintiffs proved by their evidence introduced upon the trial that they had, when this action was commenced, a substantial right, title, interest, and estate in and to the premises in
36 controversy, which was threatened by defendants, and of which they would have been unjustly deprived had they not brought this action, which appears from the evidence and the whole thereof, which is hereinafter set forth and follows these specifications, and is hereby made a part of this specification.

7. Because plaintiffs by their evidence introduced upon the trial connected themselves by a complete paper title and chain of written deeds with the original locations of some of the ground and premises in controversy, which said evidence and the whole of it is hereinafter set forth and follows these specifications, and is hereby made a part of *these* specifications.

8. Because plaintiffs proved by their evidence introduced upon the trial that they had in themselves the title to the ground and premises in controversy at the date of the commencement of the action, and had notoriously claimed and occupied the same as owners for a period much exceeding five years prior thereto, and
37 that they were continuously in the possession of said ground,

and that the location of the second rise of the bed rock was a matter for defendants to prove affirmatively if they sought to defeat plaintiffs' title and possession on the ground that said ground and premises lay outside of said second rise of the bed rock, which said evidence and the whole thereof is hereinafter set forth and follows these specifications, and is hereby made a part of this specification.

9. Because plaintiffs proved in their evidence introduced upon the trial that they were the owners of and possessed of and entitled to the immediate possession of the land and premises described in the complaint as the land and premises of which the plaintiffs were the owners and possessed and entitled to the possession at the date of the commencement of this action, which said evidence is hereinafter set forth and follows these specifications, and is hereby made a part of this specification.

38 10. Because the plaintiffs proved by their evidence introduced upon the trial that they, by themselves, their ancestors and grantors, had been in the quiet, peaceable, and notorious possession and enjoyment of the ground and premises in controversy as the owners thereof for more than five years prior to the inception of the pretended claim of the defendants, which said evidence and the whole of it is hereinafter set forth and follows these specifications, and is hereby made a part of this specification.

The grounds of error above set forth and numbered from 1 to 10, each included, and the reason therefor, appear from the pleadings in the cause and the admission thereon and the proceedings and papers in said cause and the evidence introduced by the plaintiffs on the trial of said cause, which said evidence and the whole of it [is] as follows, to wit:

39 *Evidence.*

This cause came on regularly for trial in the district court in and for the county of Silver Bow, Montana Territory, on March 20, 1882, one of the days of the February term, 1882, of said court; a jury was called and empaneled, and plaintiffs introduced the following evidence:

G. W. C. McCoy, called, sworn, and examined on the part of plaintiffs, testified as follows:

Examined by Mr. RANDOLPH:

Mr. McCoy, what is your occupation?
I am a miner, sir.
Where do you reside?
Down here, near Rocker; between Rocker and Silver Bow.
Are you in a mining district?
Yes, sir.
What?
Independence.
Do you occupy any position among the miners?
I am acting as recorder for mining claims.

40 Were you elected at any meeting of the miners to serve as such recorder?

Yes, sir; a meeting of the miners last June.

What are your duties as recorder?

To make and record all mining claims.

Have you books of record for that purpose?

Yes, sir.

Are you the custodian of such books?

Yes, sir.

Are they in court?

Yes, sir.

Are these the books?

(Three books shown witness.)

That is the book (witness designated book marked No. 2). These I don't know anything about (witness designated books marked No. 1 and No. 3). These (designating No. 1 & No. 3) were not in your custody?

No, sir.

Do you know in whose custody they were?

No, sir.

How long have you lived in Independence mining district?

41 I have lived there continuously since September, 1868.

Have you attended the meetings of the miners?

Yes, sir.

Is it an organized mining district?

Yes, sir.

Where does it extend?

I don't know the limits of the district.

Are you familiar with the location of claims from 237 to 242?

No, sir; I know there are such claims, but I don't know where they are.

Do you know where the Colorado smelter is?

Yes, sir.

Does Independence mining district run east of that?

Yes, sir.

How far?

I think the east boundary is the main range.

How far west does it run?

To between Rocker and Silver Bow; about a half mile below Rocker; probably a little more than that.

By Mr. FORBIS: The records will show that Mr. Randolph.

I don't know that they do.

42 To the WITNESS: Do you know what the rules and regulations of the miners are? That book is marked "2." Do you know about any of the customs existing among the miners in regard to representing their claims?

Well, sir, all I can say about that is what I heard. I have never seen any local laws.

and that the location of the second rise of the bed rock was a matter for defendants to prove affirmatively if they sought to defeat plaintiffs' title and possession on the ground that said ground and premises lay outside of said second rise of the bed rock, which said evidence and the whole thereof is hereinafter set forth and follows these specifications, and is hereby made a part of this specification.

9. Because plaintiffs proved in their evidence introduced upon the trial that they were the owners of and possessed of and entitled to the immediate possession of the land and premises described in the complaint as the land and premises of which the plaintiffs were the owners and possessed and entitled to the possession at the date of the commencement of this action, which said evidence is hereinafter set forth and follows these specifications, and is hereby made a part of this specification.

38 10. Because the plaintiffs proved by their evidence introduced upon the trial that they, by themselves, their ancestors and grantors, had been in the quiet, peaceable, and notorious possession and enjoyment of the ground and premises in controversy as the owners thereof for more than five years prior to the inception of the pretended claim of the defendants, which said evidence and the whole of it is hereinafter set forth and follows these specifications, and is hereby made a part of this specification.

The grounds of error above set forth and numbered from 1 to 10, each included, and the reason therefor, appear from the pleadings in the cause and the admission thereon and the proceedings and papers in said cause and the evidence introduced by the plaintiffs on the trial of said cause, which said evidence and the whole of it [is] as follows, to wit:

39 *Evidence.*

This cause came on regularly for trial in the district court in and for the county of Silver Bow, Montana Territory, on March 20, 1882, one of the days of the February term, 1882, of said court; a jury was called and empaneled, and plaintiffs introduced the following evidence:

G. W. C. McCoy, called, sworn, and examined on the part of plaintiffs, testified as follows:

Examined by Mr. RANDOLPH:

Mr. McCoy, what is your occupation?
I am a miner, sir.
Where do you reside?
Down here, near Rocker; between Rocker and Silver Bow.
Are you in a mining district?
Yes, sir.
What?
Independence.
Do you occupy any position among the miners?
I am acting as recorder for mining claims.

40 Were you elected at any meeting of the miners to serve as such recorder?

Yes, sir; a meeting of the miners last June.

What are your duties as recorder?

To make and record all mining claims.

Have you books of record for that purpose?

Yes, sir.

Are you the custodian of such books?

Yes, sir.

Are they in court?

Yes, sir.

Are these the books?

(Three books shown witness.)

That is the book (witness designated book marked No. 2). These I don't know anything about (witness designated books marked No. 1 and No. 3). These (designating No. 1 & No. 3) were not in your custody?

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I think the east boundary is the main range.

How far west does it run?

To between Rocker and Silver Bow; about a half mile below Rocker; probably a little more than that.

By Mr. FORBIS: The records will show that Mr. Randolph.

I don't know that they do.

42 To the WITNESS: Do you know what the rules and regulations of the miners are? That book is marked "2." Do you know about any of the customs existing among the miners in regard to representing their claims?

Well, sir, all I can say about that is what I heard. I have never seen any local laws.

Then we dont want it. This book marked "2" you are now using to record claims in Independence mining district?
Yes, sir.
And there is no other?
None that I have seen; that is all.

No cross-examination.

JOHN ULRICH, called, sworn, and examined on the part of plaintiffs, testified as follows:

Examined by Mr. RANDOLPH:

Mr. Ulrich, what is your occupation?
Mining.
Where do you reside, sir?
In Independence district, Silver Bow county.
43 Where?
Rocker, I think it is called.
How long have you lived there in the district?
Since 1865.
Were you living there at the time Independence district was organized?
Yes, sir.
Did you attend a meeting at which they made a district of it?
I believe I did.
Have you ever acted as an officer of the district?
Yes, sir.
Up to what time?
Let's see. Well, I don't know when we did have the miners' meeting—a year ago last fall, I think.
What were your duties?
I was recorder—to record claims, if anybody wanted them recorded.
And you were the custodian of the books of record?
Yes, sir.
Would you recognize the books if you should see them?
44 I would, sir.
Look at this and see what you say about it. (Three books shown witness, the book marked "2," formerly identified by witness McCoy, and books marked No. 1 and No. 3.)
Yes, sir; these are the ones.
Are there any others?
No, sir.
Were there any others?
Not that I know of.
If another had been lost you don't know anything about it?
No, sir.
How long did you have the custody of these books as recorder?
As near as—about two years.
You have recorded claims in these books?
I have, sir.

We offer these records in evidence.

(No objection. Books marked No. 1, No. 2, and No. 3 received in evidence as identified by witnesses McCoy and Ulrich.)

To the witness: Did you know Nelson Wolverton?

45 Yes, sir.

Did he die?

Yes, sir.

When, sir?

About three years ago, I think, last January.

Did he leave a wife?

Yes, sir.

How many children?

Three children.

Are they all living?

No, sir.

Which died?

One died—the second youngest.

Do you know the names of those living?

Willie Arthur and Eva Jane Wolverton, if I mistake not.

At the time of Nelson Wolverton's decease, or immediately prior thereto, was he working any placer ground?

Yes, sir.

What was the location of the ground he was working?

It was situated on Silver Bow creek or gulch.

46 How long had he been working the land in the district that you know of?

Well, I can't tell exactly. I think it was in '67 or '68.

Was he working continuously up to the time he died?

Yes, sir; he worked every year in the district since 1867.

JUDGE KNOWLES. If the object is to show possession of the premises, I object. If they show he was working on this ground in controversey I have no objection; but if they show he was working on other ground I object.

Mr. RANDOLPH. We know what our object is—that he was a miner and worked in the district.

THE COURT. It can be shown for that purpose.

Mr. RANDOLPH. Are you acquainted with the Placer claims known as 237 to 242, inclusive?

Yes, sir.

Did you ever know Mr. Wolverton to be working upon these claims?

Yes, sir.

How long did you know of his working there?

47 Well, I knew he worked himself two seasons, at least.

Right on these claims?

Yes, sir; right on these claims.

Did you hear whether he owned these claims or not?

Judge KNOWLES: I object to his asking him whether he owned these claims or not. If he got a conveyance it is the best evidence.

Mr. RANDOLPH: Suppose he had no conveyance?
The COURT: The objection is sustained.
Mr. RANDOLPH: Note an exception.

To the witness: Mr. Ulrich, what is the extent of Independence district?
It is from 85 to 200, somewhere; I can't tell exactly what. It commences below Rocker and runs above the Colorado smelter.
How far above?
Above the bridges that crosses Silver Bow creek.
Is it above claim 242?
Yes, sir.
A long way?
Yes, sir; a long way.
Have you ever been over that ground?
48 Yes, sir.
Have you ever been on the ground above that, along claims 243 to 263 or 273; have you been there?
Yes, sir; many times.
Do you remember a water-wheel there?
Yes, sir.
On what claim is that?
I think it is on 248, or in that neighborhood.
Has that been there a long time?
Yes, sir.
How is it situated on the claim?
It is covered up in the tailings at present.
We have the records of the district in evidence, and I desire to call attention to claims 237 to 242, inclusive.

(Reads from book "3," page 93, location of claim number 237, as follows:)

"This is to certify that C. C. Pierce has this day relocated and recorded claim number 237, above discovery, on Silver Bow creek, Independence district, Deer Lodge county, Montana Territory, June 15, A. D. 1868.

"MATHEW M. BARNEY,
"*Deputy Recorder.*"

49 And from book 3, page 96, as follows:

"Be it known that A. Chitic has this day relocated and recorded mining claim No. 238, two hundred and thirty-eight, above discovery, in Silver Bow gulch, Independence district, Deer Lodge county, Montana Territory.

"Given under my hand this 1st day of August, A. D. 1868.

"S. OWENS, *Recorder.*"

And from book 2, page 41, as follows:

"Be it known that William Lawson has this day relocated and recorded gulch claim No. 239, above discovery, in Silver Bow gulch, Independence district, Deer Lodge county, Montana Territory.

"Given under my hand this 19 day of July, A. D. 1869.

"S. OWENS, *Recorder.*"

And from book 1, page 35, as follows:

"This is to certify that John Manning has relocated and recorded claim No. 240, two hundred and forty, above discovery, Independence district, Silver Bow creek, Deer Lodge county, Montana Territory, May 1st, A. D. 1866.

50 "S. OWENS, *Recorder.*"

And from book 1, page 34, as follows:

"This is to certify that Robert Cunic has this day relocated and recorded claim No. 241, two hundred forty-one, above discovery, Silver Bow creek, Independence district, Deer Lodge county, Montana Territory, May 1st, A. D. 1866.

"S. OWENS, *Recorder.*"

And from book 1, page 34, as follows:

"This is to certify that John Currie has this day relocated and recorded claim No. 242, two hundred and forty-two, above discovery, Silver Bow creek, Independence district, Deer Lodge county, Montana Territory, May 1, 1866.

"S. OWENS, *Recorder.*"

The aforesaid six notices were read from the books identified by witnesses, McCoy and Ulrich, as the records of Independence district.

Mr. RANDOLPH: While the witness is on the stand I desire to call the court's attention to the laws of Independence district (mining), in book 1, page 61, of the records, the by-laws of Independence mining district. I will put them all in evidence, the proceed-

51 ings of the miners, in book 1, page 61, and following.

The COURT: You propose to follow this all with proof that the by-laws are complied with?

Mr. RANDOLPH: No, sir; I am going to prove that these locations were made according to the by-laws.

The COURT: The by-laws had better be read to the jury.

By-laws, book 1 of records, page 61, read to the jury as follows:

By-laws of Independence District, Deer Lodge County, Montana Territory, Adopted May the sixth, A. D. 1865, at a Miners' Meeeting.

Article I.

That this meeting approve of the proceedings of a former meeting held for the purpose of forming a new district, known as Independence district.

Article II.

The officers of this district shall consist of a president, vice-president, and recorder. It shall be the duty of the president, and in his absence the vice-president, to call miners' meetings when it is

52 necessary, and preside over the same, for which he shall be entitled to a fee of ten dollars, to be paid by the party applying for the meeting of the miners.

Article III.

It shall be the duty of the recorder to keep a true and accurate record of all claims, and act as secretary of all meetings, of which he shall keep minutes for the inspection of the miners.

Article IV.

Placer claims in this district shall consist of 100 feet in length, extending up the creek or gulch, extending upon either side of the banks to the second rise of the bed rock. The same specification shall apply to dry gulches. Hill claims shall consist of 100 feet front, extending back to the summit of the hill.

Article V.

Each claimant shall be entitled to hold in this district one claim for pre-emption, and as many more as he can purchase and represent according to the laws of the district. This law shall also apply to dry gulch and hill.

Article VI.

53 What shall constitute a representation of a claim in this district shall be one day's work in each week on his claim, or performing the same amount of labor any place in the district if he is working for the means to open his claim. Any person wishing to leave the dsstrict for the same purpose can do so by leaving a written notice with the recorder, which will entitle him to fifteen days absence.

Article VII.

Claim-holders shall have the right to cut, drain, ditch through claim below; no person shall have the right to dam the water to the injury of others above having located claims above prior to the commencement of dam.

Article VIII.

General meetings of the claim-holders in this district can only be held by at least thirty *bona fide* claim-holders petitioning the president in writing. The ten dollars fee spoken of in article 2 shall only apply to special meetings of the miners.

Article IX.

54 Dry gulches, in belonging to this district, shall be held as real estate, except it be when there is a sufficiency of water to work them properly or profitably.

CHARLES L. WILLIAMS.
W. T. SCOVILLE.
JAMES R. CAMPBELL.
DANIEL THOMPSON.
FRANCIS D. McDERMOTT.

This is a true copy.

R. McMINN, *Recorder.*

Mr. RANDOLPH: I will call attention to a conveyance of claim 238, made by A. Chitic to Thomas Manning in 1869, in book 2, page 36.

Judge KNOWLES: That is not a legal record at all, and I object to reading it as a conveyance. If they prove the loss of the conveyance, and this is a copy, I won't object.

Mr. RANDOLPH: We offer it for what it is worth. The miners had no other way of recording conveyances.

55 The COURT: Was there an original conveyance of which this is a copy?

Mr. RANDOLPH: We offer this as an original, then.

Judge KNOWLES: Then prove that signature.

The COURT: Under the common rule this would be simply a record, and not the original. It must be shown that the original was lost and that this was the manner of recording claims.

The objection is sustained.

Mr. RANDOLPH: We will call Mr. Manning for that purpose.

THOMAS MANNING, called, sworn, and examined on the part of the plaintiffs, testified as follows:

Examined by Mr. RANDOLPH:

Mr. Manning, do you remember about a deed from A. B. Chitic to Thomas Manning?

Yes, sir; A. B. Chitic?

Yes, sir.

Yes, sir.

Do you know where that deed is?

I do not.

Was it in your possession?

Yes, sir; for 5 or 6 years.

Did you have it recorded?

56 Yes, sir; I think it was recorded.

Do you remember the condition of the paper?

I don't say all; he sold me a claim 100 feet or 200.

Do you know what became of that paper?

No, sir.

Did you ever look for it?

Yes, sir; at the last term of court I looked for it, but could not find it.

Did you make a diligent search?

Yes, sir.

And could not find it?

No, sir.

Where was it recorded?

In Independence mining district. S. Owens was recorder.

Mr. DEWITT (to witness): Do you remember me asking you at the May term of court to look for this deed?

Yes, sir.

Did you make diligent search for it?

Yes, sir.

And could not find it?

No, sir.

57 Mr. RANDOLPH: I offer this in evidence now.

Judge KNOWLES: I would like to see if this is a copy.

Mr. RANDOLPH: Mr. Manning, read that paper.

(Witness read from book 2, page 36, of the record as follows:)

"Know all men by these presents that I, A. B. Chitic, have this day bargained and sold to Thomas Manning all my right, title, and interest in and to the following-described mining ground: Claim No. 238, two hundred and thirty-eight, situate in Independence district, Deer Lodge county, Silver Bow gulch, Montana Territory, for and in consideration of the sum of $25.00, twenty-five dollars, to me in hand paid, the receipt of which I do hereby acknowledge.

"Given under my hand and seal this 31st day of May, A. D. 1869.

"A. B. CHITIC.

"Witnesses:

"C. H. CUVENT.

"SAM'L BEAUCHAMP."

The WITNESS: It is the same thing.

Mr. RANDOLPH: We offer it in evidence.

No objection.

58 While the witness is here I will go through and see if there is not another one.

Do you remember a conveyance or an assignment of a mining claim from William Lawson to you?

Yes, sir.

Did you ever have the original of that in your possession?

The bill of sale?

Yes.

Yes, sir.

Have you it now?

No, sir.

Have you lost it?

Yes, sir.

Did you make diligent search for it?

Yes, sir.

When?

At the last term of court.

Read that on page 50, book 2.

Witness reads.

Yes; I remember that.

Is that a copy of the one you had?

It is a copy of the bill of sale.

We offer this in evidence.

59 The COURT: You may read this; you have proved the loss of the original.

Record read from book 2, page 50, as follows:

"MONTANA TERRITORY,
Deer Lodge County, Independence District:

"Know all men by these presents that I, William Lanson, have this day bargained and sold, and by these presents do grant and convey, unto Thomas H. Manning all my right, title, and interest in and to mining claim 239, two hundred and thirty-nine, above discovery, in Silver Bow gulch, for and in consideration of the sum of $50.00, fifty dollars, the one half to me in hand paid, the other half to be paid when it is taken out of the ground over expenses.

"Given under my hand and seal this 29th day of July, A. D. 1869.

"WM. LANSON.

"Witness:
"R. W. CAMPBELL.

"Recorded Oct. 12, 1869.

"WM. RUMPF,
"*Deputy Recorder.*"

Mr. RANDOLPH: I believe you stated you were acquainted with claims 237 to 242?

Yes, sir.

60 What is the length of these claims up and down?

100 feet.

Examination of Mr. ULRICH continued:

Mr. RANDOLPH: Mr. Ulrich, do you know what the old laws were in reference to locating claims?

One claim by pre-emption and as many more as he could buy.

What was the length up and down the gulch?

100 feet.

Was that the old law before these went into effect?

Yes, sir; I believe it was.

How far on either side were they to extend?

To the second rise of the rim rock.

What was the mining season?

From the first of May to the fifteenth of October, I believe.

Was representing to be done outside of the mining season?

No, sir.

Is that the rule there now?

Yes, sir.

How long has it been the rule?

61 Ever since I lived there. I don't know that it has ever been changed at all.

What was the rule in reference to representing claims?

One day in the week on one claim represented all the claims a man had in the district.

That is all.

Cross-examination by Mr. FORBIS:

When did these old laws go in force? Were they the old Summit Mountain district laws?

Yes, sir.

Do you know the date of the organization of the district?

I don't know.

Was it not in January, '65?

No, sir; I think not; that is, not in mining season; but it might have been.

Were all these laws written?

Yes, sir.

You had no other than the written laws?

Well, customs.

You are speaking of the laws prior to the enactment of the
62 laws? Mr. Randolph said: "I think these laws were the same as they are now; one day in each week in the district; one claim by pre-emption, and as many more as you could purchase."

Yes, sir.

Look at article 7, and see if you are not mistaken about the number of claims a man can hold. (Book 3, page 99, shown witness.) What was the law prior to that time about the work done on a claim?

Well, the custom we had there was one day in a week.

Did you have any other custom except what was written?

We had the customs——

Who established the customs?

The miners.

Was not that done at a meeting?.

We did not have any meeting for a good while, and we made that custom of one day in the week.

Examine article 8 and see what amount of work has to be done on a claim? (Book 3, page 99, shown witness.) How do you find that?

63 Two days in a week, and must be done on each claim.

Yes, sir.

I desire to introduce this in evidence.

The following read to the jury from Book 3, page 98, 99, and 100:

By-laws of Independence District (Mining), Deer Lodge County, Montana Territory, January the twentieth, 1865, A. D.

Article I.

That all that portion of Summit Mountain district, Silver Bow creek, from the forks of the creek to and including mining claim No. seventy-five, above discovery, be and the same is hereby formed into and constituted a new district, to be known as Independence district.

Article II.

That the officers of this district shall be a president and vice-president and recorder, whose duties it shall be defined by the laws of this district.

Article III.

That for the government of this district until the first day
64 of May, A. D., 1866, we adopt the laws of Summit Mountain district, and that the recorder procure and keep a true copy of the same.

Article IV.

That the recorder procure from the records of the Summit Mountain district a true copy of all the records pertaining to claims in this district and copy the same into the book of records of this district.

Article V.

That the proceedings of this meeting form a part of the laws and records of this district.

Article VI.

Placer claims in this district shall consist of 100 feet in length, extending up the gulch or creek, extending upon either side of the banks to the second raise of the bed rock, and this same specification shall apply to dry gulches; and hill claims shall consist of 100 feet front, extending back to the summit of the hill.

Article VII.

Each claimant shall be entitled to hold upon Silver Bow
65 creek one claim by location and one by purchase, also one claim by location and by purchase on dry gulch and hill, and each claimant shall be entitled to all mineral therein contained.

Article VIII.

After staking a claim by an actual claimant, there shall be done two days' work upon each claim in each week, unless they be held in company, when they may be represented by working upon one so held. This law shall be strictly construed, except in cases of urgent necessity, when a claimant may be absent himself from his claim twelve days by first filing a notice with the recorder of such absence. Dry gulch and hill claims, after being prospected and recorded, shall be held as real property until water can be had to work the same advantageously.

Article IX.

An actual locator who shall have left the creek with the understanding that he had twenty days from the 4th of August, 1864, to represent his claim shall hold good his individual interest by
66 acting in accordance with that act, but this shall not apply to claims located by proxy.

Article X.

Claim-holders shall have a right to cut a drain ditch through claims below. No person shall have a right to dam the water to the injury of others above having located claims above prior to commencement of dam.

Article XI.

There shall be a president, vice-president, and recorder, and it shall be the duty of the recorder, or, in his absence, the vice-president, to call together the miners in mass meeting, and he shall preside over the same, before which tribunal all disputes and litigation shall come, and their decisions shall be final, until after a regular county organization; and it shall be the duty of the recorder to keep a true and accurate record of all claims, and he shall act as secretary of all meetings, of which he shall keep minutes for the inspection of the miners.

This is a true copy taken from the book of records of Summit Mountain district.

67 By R. McMINN, *Recorder.*

Mr. RANDOLPH: I object to that as being a copy of the laws of another district.

Mr. FORBIS: Where was No. 75?

The WITNESS: A little below McMinnville bar.

Where is that?

Below Rocker.

Where does Summit Valley district extend to?

I think it is claim 280; Independence district goes up to that.

Do you know where is the boundary of Independence mining district?

I can't tell you exactly; where the bridge crosses the creek.

Were there any rules as to that?

Yes, sir.

When were they made?

I think in 1865.

Mr. RANDOLPH: The boundaries are all given in book 3.

Mr. FORBIS: Where are the forks of the creek? You said in Brown's gulch?

Yes, sir.

68 That would leave Independence district from Brown's gulch up?

No, sir.

Where are the forks of the creek?

Well, somewhere in Brown's gulch.

Then Independence district would extend from below Rocker to Brown's gulch?

No, sir; it is the other way. It starts from the forks of the creek and runs to and including discovery.

Do you know what is meant by the forks of the creek?

No, sir; to come right down to it.

Is there any forks of the creek about claim No. 280?

Yes, sir.

What forks?

The right and left hand forks.

You don't know whether it refers to that?

I do not.

That would make it right?
Yes, sir.
How about this work to be done on the claims; have there
69 been any laws passed, or have the laws been changed since May, 1865?
The laws have been changed—one day in the week on one claim represented all a man's ground in the district.
Has that to be made on each claim?
It is one day's work in the district represented all the ground a man held in the district.
When did that organize?
I think in 1866.
Are there any writings in relation to it?
I don't know that there is.
Do you know any other laws except what are in the books?
I don't know of any except the customs.
Then what rules and regulations have been in force since that time?
Well, one day in the week.

Mr. RANDOLPH: Do you know if all the laws adopted since 1866 have been put in the books?
No, sir; I don't know; I don't know if they have been.
That is all.

70 T. T. BAKER, called and sworn in behalf of the plaintiffs, *and* testified as follows:

Examined by Mr. RANDOLPH:

Mr. Baker, what is your occupation?
Surveyor.
Are you a United States officer?
Yes, sir; a United States deputy mineral surveyor.
Were you called upon to make an adverse survey for — in the case of Wolverton *vs.* Nichols?
Yes, sir; I was.
Did you make the survey?
Yes, sir.
Look at that plat, sir, and tell me who made that.
That is one I made.
Is it a true map of the ground there?
Yes, sir.
Are you familiar with the legal subdivisions represented by these lines?
Yes, sir.
What does that square place represent?
The smelter building.
And this?
The assay office.
71 Are you familiar with a water-wheel there?
Yes, sir.
Is it indicated on the map?

Yes, sir; at that point.
Are the indications on the map correct, sir?
Yes, sir; I made them at the time.
We offer them in evidence.

The COURT: Any objection to this?
Mr. FORBIS: Where is the water-wheel, Mr. Baker?
Mr. BAKER: Right there.
Mr. FORBIS: We have no objection.

The following map, as identified by witness, was received in evidence:

(Here follows diagram marked page 71.)

72 Mr. RANDOLPH: This represents Silver Bow creek; how far is it from the gulch to where this commences?
This is lot 40, and it is about half way to the ditch.
How many feet?
700, probably.
From the gulch to where this adverse commences?
Yes, sir; that is on one side of the gulch. It runs right up the hill?
That is all.

Mr. FORBIS: What is the character of that break there where the ditch commences?
It is a slight rise in the bank of about two feet.
This ditch runs right at the foot of this break?
I believe it does.
That is all.

THOMAS PURCELL, called, sworn, and examined on the part of the plaintiffs, testified as follows:

Examined by Mr. RANDOLPH:

Mr. Purcell, what is your occupation?
Mining.
Where do you reside?
73 I live west of town.
Did you ever live in Independence mining district?
Yes, sir.
How long?
Over twelve years.
Did you at that time own and work any placer mines?
Yes, sir.
How long have you known Independence mining district?
Since 1865.
Were you present at a meeting of the miners that organized that district?
I was, on the first day of May, 1865.
Do you know placer mining claims numbered from 237 to 242?
Yes, sir.
Did you ever own any of them?

Yes, sir.

Which ones did you own?

I owned it from 230 to 243 in company with my brother—fourteen claims.

74 Do you remember having in your possession the deeds of claims 237, 238, 239, and 240, from Mr. Manning to yourself?

Yes, sir.

Have you them still?

No, sir; I have not.

Did you lose them?

I destroyed them.

When?

When I got through at the gulch, about five years ago. I don't know whether I threw them away or burnt them, or not.

They were recorded, were they?

Yes, sir; with the district recorder.

Do you know the conditions of that deed? Would you if you heard it read?

From Manning to me?

Yes.

Yes. I got two deeds from Manning and recorded them both.

(The following was read to the witness from book 2, page 57, of the records in evidence:)

"Know all men by these presents that I, T. H. Manning, do this day bargain and sell, and by these presents do grant and
75 convey, unto Thomas H. Purcell all my right, title, and interest in and to the following-described property, consisting of claims number- 234, 235, 236, 237, 238, 239, 240, for and in consideration of the sum of $575.00, five hundred and seventy-five dollars, the receipt of which I do hereby acknowledge.

"Given under my hand and seal this fourth day of December, 1869.

"Silver Bow Gulch, Silver Bow Township, Deer Lodge county, and Territory of Montana.

"T. H. MANNING.

"Witness-:

"T. H. GOLDEN,

"JAMES TOUHEY.

"Recorded January 10th, 1870."

The WITNESS: That is right.

Mr. RANDOLPH: Is that a copy of the one you had?

Yes. Yes; that's it.

I offer that in evidence.

The COURT: If there is no objection this will be taken.

No objection.

76 Mr. RANDOLPH: Were you ever in partnership with your brother?

Always.
Did you combine all the property you bought?
We sold it to Wolverton altogether.
Did you each have half interest in what you bought?
That was the understanding between us.
Do you remember your brother receiving a deed from J. H. Reilly?
I do.
To what were known as the Currie claims?
Currie and some other parties owned them; Reilly owned them and sold to my brother.
Did you ever have that deed in your possession?
Yes, sir.
Have you it now?
No, sir.
What became of it?
It was lost like the others.
Did you destroy it?
I don't know what became of it.
Did you, last May, or at any other time, make a diligent search for it?
I did.
77 And did not find it?
No, sir.
Would you know it if you heard it read?
Yes, sir.

The following, from book 3, page 61 of the records in evidence, was read to the witness:

"SILVER BOW, *May the* 2, 1868.

"Know all men by these presents that I, Joseph H. Reilly, have bargained and sold all my right, title, and interest in the following-described mining property, to wit:

"The claims known as the Currie claims, No. (241) two hundred and forty-one and (242) two hundred and forty-two and (243) two hundred and forty-three and (232) — thirty-two, No. (234) — thirty-four, located on Silver Bow creek, Independence district, Deer Lodge county, Montana Territory, to John Purcell, for the sum of one hundred dollars, to be paid to me on the first day of September, 1868.

"JOSEPH REILLY.

"Witness-:
"THOS. MANNING, JR.
"M. NUMAN.

78 "Recorded May 19, 1868.

"S. OWENS, *Recorder.*"

The WITNESS: That is right.
Mr. RANDOLPH: Is that the paper that you had?
Yes, sir; that is the one we had in our possession.

We offer that in evidence.

Mr. FORBIS: How is Reilly connected with the claims? If he is not connected we object to it.

The COURT: Are any of these claims in that ground that is sought to be recovered?

Mr. RANDOLPH: Yes; two of them—241 and 242—the last two.

Mr. FORBIS: I hav'n't seen any transfer to Reilly, and don't know that he located them.

The COURT: Do you propose to follow this up and prove title in Reilly?

Mr. RANDOLPH: Yes, sir.

The COURT: It can be asked, with that understanding.

Mr. RANDOLPH: At the time you got this deed from Reilly
79 and was in possession and worked this ground——

Mr. FORBIS: We object.

The COURT: What is the purpose of this evidence?

Mr. RANDOLPH: To show that, first, *that* Purcell came into the possession of the claims by and under a deed; that he bought them from the other men who *was* in actual possession, and worked them for a long time. We will show that some of the papers were lost and that Reilly was the owner of these claims and was working them, and that Purcell bought them and owned them.

The COURT: You don't offer to show any paper title in Reilly?

No, sir; for the records were lost; but doubtless he had the title from Currie. We can't show written title; it doesn't exist.

The COURT: Did it ever exist?

Yes, sir; we will show that.

80 The COURT: You will show the title from Currie to Reilly was lost?

Yes, sir.

The COURT: Then, with that understanding, the objection will be overruled.

Mr. RANDOLPH: Are you familiar with the rules and customs of the miners of Independence mining district?

Yes, sir.

What was the custom that was always observed in relation to representing claims?

Well, a man that had ground there, if he didn't have water to work his ground and he wasn't able to work it, the work done anywhere would represent his ground for wages, and if there was water in his creek he worked one day in each week.

Would one day's work represent all the claims in the district?

Yes, sir: the way I understood it.

Have all the miners represented in that way?

Yes, sir.

Since when?

Since 1866.

81 Do you know where the district runs?

Yes. From on the McMinnville bar to 310, above discovery. It is that same place where the railroad depot stands—no; one commences at discovery and runs up to 310.

Where is the McMinnville bar?

There was a tunnel there, but it is washed out. I think part of Rocker is 110.

Then it runs from Rocker above the smelter?

Yes, sir.

And these claims, 237 to 240, are in Independence mining district?

Yes, sir; they are.

When you bought these claims from Reilly was anybody working them?

It was my brother bought them, and we were in company.

Yes. Was anybody working these claims?

The owners were.

Who were the owners?

Joe Reilly.

How long had he been the owner?

I can't tell.

82 Judge KNOWLES: We object.

Objection sustained.

Mr. RANDOLPH: Do you know who owned them before Reilly?

Judge KNOWLES: We object.

COURT: Same ruling.

Mr. RANDOLPH: Note an exception.

Mr. DEWITT: I would call the attention of the court to sec. 816 of the Code of Civil Procedure, and request that the court make an entry on the record directing that bills of exception be prepared in vacation and signed *nunc pro tunc*.

The COURT: Let the order be made.

Mr. RANDOLPH: At the time your brother got these deeds did you take possession of the claims?

Yes, sir.

Did you do any work on them?

Yes, sir.

One was made Dec. 4, 1869, and the other was made in 1868. Now, in 1870, did you or your brother do any work on these claims?

83 Why, of course, we did. We opened out the mine.

In 1871, did you?

Yes, sir.

For how long did you continue to work those mines?

During the mining season we mined them until 1875.

Then what did you do?

Sold them to Wolverton.

I have here a certified copy of a deed from Thos. Purcell and John Purcell and wife to Nelson Wolverton. I will simply state it transfers claims 237 to 240, inclusive.

Deed duly certified, offered, and received in evidence. No objection; and read to the jury as follows:

This indenture, made the eighth day of November, A. D. 1875,

by and between John Purcell and Ellen Purcell, his wife, and Thomas Purcell of Deer Lodge county, Montana Territory, of the first part, and Nelson Wolverton, of the same county and Territory, of the second part—

Witnesseth: That the said parties of the first part, in con-
84 sideration of the sum of four hundred and fifty dollars, do hereby grant, bargain, sell, convey, and confirm unto the said party of the second part all and singular the following-described property, all situate and being in the county of Deer Lodge and Territory of Montana, to wit:

Gulch placer mining claims Nos. (230) two hundred and thirty, two hundred and forty-three (243), both inclusive, above discovery claim, and commencing at the upper end of what is known as the Dan. Waffey ground above Rocker City, in Independence mining district, being 13 claims of 100, one hundred, feet each, together with all and singular the improvements thereon, and the rights, privileges and appurtenances thereunto belonging or in anywise appertaining; and the said parties of the first part, for the consideration aforesaid, do also sell, convey, and deliver unto the said party of the second part all the tools, wheels, and pumps, sluice-boxes, wheelbarrows, and all other personal property upon or belonging to said mining ground above described or owned and used in connec-
85 tion therewith; and also one house or cabin upon and belonging to the same; to have and hold all of said property unto the said party of the second part, his heirs, representatives, and assigns, forever.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

THOMAS PURCELL. [SEAL.]
ELLEN PURCELL. [SEAL.]
JOHN PURCELL. [SEAL.]

TERRITORY OF MONTANA, } *ss:*
County of Deer Lodge, }

On this 9th day of November, A. D. 1875, before me, Isaac Dean, notary public in and for said county, personally appeared John Purcell and Ellen Purcell, his wife, and Thomas Purcell, all personally known to me to be the persons described in and who executed the foregoing instrument, and who severally acknowledged to me that they executed the same freely and voluntarily and for the
86 uses and purposes therein mentioned; and on the said same day the — Ellen Purcell, wife of the said John Purcell, who is personally known to me to be the person whose name is subscribed to the foregoing conveyance as a party thereto, personally appeared before me, and was by me made acquainted with the contents of said conveyance, and acknowledged to me on examination, apart from and without the hearing of her said husband, that she executed the said conveyance freely and voluntarily, without fear or compunction or under influence of her husband, and that she did not wish to retract the execution of the same.

In witness whereof I have hereunto set my hand and affixed my notarial seal the day and year first aforesaid.

[SEAL.] ISAAC DEAN,
Notary Public.

Filed for record Nov. 10, A. D. 1875, at 8 o'clock a. m.

H. S. CLARK,
County Recorder.

87 TERRITORY OF MONTANA, } ss:
County of Deer Lodge, }

I, J. S. McAndrews, county clerk and *ex-officio* recorder in and for said county, hereby certify that the foregoing is a full, true, and and correct copy of the placer mining deed herein described as the same appears of record in book "J" of deeds, pages 5, 6, 8, and 564, records of Deer Lodge county, M. T.

Attest my hand and official seal this 21st day of March, A. D. 1882.

[Deer Lodge Co. Seal.]

JAMES S. McANDREWS,
County Clerk and Recorder.

Mr. RANDOLPH (to witness): What work did you do on these claims?

Mined them.

What was the character of the mining?

Placer mining and gulch mining.

Had you any sluice-boxes or houses built on them?

Yes, sir.

Were you living on them?

88 Yes, sir.

How long?

I lived from '70 to '77. In May, '77, I moved from there to Butte.

Did you represent them all, sir, by doing at least one day's work?

I represented them by mining from the 1st of May to September, and there was no other representing needed.

Did you work every day?

Yes, sir.

Did your brother work with you?

Yes, sir.

Did anybody else work with you?

Sometimes.

That's all.

Cross-examined by Mr. FORBIS:

What do you know about the mining customs in reference to representing a claim?

What do I know?

Yes. When did they have their origin? Were they adopted at a miners' meeting?

Of course.

And this was the only law?

89 Yes, sir; and passed by unanimous vote.

Was that the only law?

As far as I know.

When was that passed?

The first of May, '66.

Were they recorded; do you know?

I don't know whether they were recorded or not. McMinn read them out to the meeting there and they passed vote.

That's all.

JOHN ULRICH, recalled for plaintiffs and examined by Mr. RANDOLPH, testified as follows:

Are you sure these records are complete?

No; I am not.

Not sure?

No, sir.

Have you heard, among the miners of Independence mining district, that some of the records were lost?

Judge KNOWLES: We object; if he knows the records are lost he can say so.

Mr. RANDOLPH: We can show that by general repute.

Objection sustained.

90 Mr. RANDOLPH: The plaintiffs offer to prove by some of the miners of Independence mining district that some of the records have been lost, and we take an exception to the ruling of the court.

Mr. RANDOLPH: I will ask you, is it, to your knowledge, the general repute among the miners of Independence mining district that some of the records are lost?

Judge KNOWLES: We object; it is the same thing.

Objection sustained.

Mr. RANDOLPH: Note an exception.

That is all.

Cross-examined by Mr. FORBIS:

Do you know, of your own knowledge, that some of the records were lost?

I do not.

That is all.

WILLIAM D. THOMAS called, but not present.

CHARLES H. CARVER called for the plaintiffs, and testified as follows:

91 Examined by Mr. RANDOLPH:

Mr. Carver, what is your occupation?

Mining.

Are you acquainted with Independence mining district?

Yes, sir.

Have you lived there?

I have.

Do you live there now?

Yes, sir.

How long have you lived there?

Since 1875.

Were you familiar with Independence mining district before that time?

In '66 I was.

Do you know whether it is a regularly organized mining district?

Yes, sir.

Do you know any of the customs of that district?

I did in 1866.

What was the custom of representing claims?

One day represented the ground.

What ground?

Placer ground gulch.

92 Suppose a man owned twelve claims, what would he be required to do to represent them; one day's work in the district each week?

That was the custom in 1866.

Has it been the custom since then?

Yes; since 1875 it has.

Have you known any other custom to exist since 1866?

No, sir.

Are you acquainted with any of the miners there?

All of them, I believe.

Do you know of any miner pursuing a custom different from that?

Not that I know of; not to my knowledge.

Have you been mining there yourself, sir?

Yes, sir.

Did you represent your ground by that custom?

I have.

Are you familiar with claims numbered 237 to 242?

What ground I have had there I worked it.

93 I asked you if you were familiar with claims 237 to 242?

I don't know the numbers; I think it is this ground in dispute.

Do you know this ground in controversy?

Yes, sir; but I am not positive about the number of the claim.

Do you know whether Nelson Wolverton, in 1875, represented that ground?

In 1875, I think that is the year he bought it of Purcell. I think he bought it in the winter, and it didn't need representing.

Do you know anything about the work done by Mr. Wolverton? This deed from Thomas Purcell and brother to Wolverton is dated

the 8th of November, 1875; what was the mining season at that time?

I believe we had to represent from the first of May to the first of October.

Has that been changed since then?

Not to my knowledge.

Then November 8, 1875, was after the mining season had closed?

Yes, sir.

94 Were the miners expected to represent outside of the mining season?

No, sir; after they closed up they generally shut down.

The next year, did you know of any work done by Wolverton?

Yes, sir; in '76 he put some Chinamen to work.

How many?

Twelve that I saw there.

Were they working the entire season?

I can't tell; they worked most of the season.

Was he working there in each week during the season?

He was; he used to go up each week and look after them; they kept no account of their time, and he had to look after them.

Do you know when Wolverton died?

Yes, sir.

When?

January; 3 years last January.

Up to the time he died, what did he do with reference to working on these claims?

95 He worked it two seasons with Chinamen. The next season after his death Thomas worked it. He asked me to do some work on it and I could not. He wanted it represented and could not represent it himself; I saw him working; up to the time Wolverton died he employed Chinamen. I saw them working there two seasons.

Did you see him working there in 1879?

I saw some Chinamen, not him, in 1878. I don't say whether he worked there or not—that is, what I call work; he was working the ground with a crew of men, and worked them two seasons—that is, on that ground.

Can you tell us whether he worked in the district?

Yes; he was working himself in the district on some ground below.

Since Wolverton's death, what do you know about any work being done there?

I don't know of any work except what Thomas done; he was administrator of the estate and represented it.

What do you know about '80, in reference to representing it? One of the witnesses testified that Wolverton died on the first of January, 1879.

96 In January, 1879. I am mistaken about his death; it will be 3 years ago this coming January—no, 3 years ago last January is right.

That would be in 1879?

Yes, sir.

Tell us about the work you knew Thomas, or any one else for Mrs. Wolverton, to do?

I only know what Thomas done; that was the first season after Wolverton's death; I know he represented the ground the way he supposed to be the custom of the district.

Can you tell us anything about Wolverton having taken possession of the claims?

Yes, sir.

When did he do that?

Right away after he bought them.

What did he do?

Well, first he went to Deer Lodge and got some grub. Once he told me if I wanted an interest in the ground I could have it, and I started to fence it; I hauled two loads of poles and he hauled two, and afterwards I told him I didn't want it, and the next spring we had the fence put up.

97 What was that fence on?

On a portion of the ground in dispute.

Which way did the fence run?

It run mostly along the gulch; we started the fence there in the fall of 1875.

Well, did he include in this fence all the land he bought of Purcell?

He intended to include in a part that would do for cutting hay on; he had these Chinamen working after the fence was put up.

What did you say in reference to '80, in regard to representing? In '79 he died?

Yes, January, 1879.

Well, Thomas represented it the next season—about '80 I am asking?

I can't say whether they represented it by working on other ground or not. I can't say that any mining was done on that ground.

How about '81?

In '81 he had Chinamen working on other ground below that.

This work was done in the district by Mrs. Wolverton?

Yes, sir.

How about '81?

98 Well, she worked ground in '81 a little below Rocker, after she sold this ground where the concentrator now stands; she put some Chinamen at work below.

How about last summer?

She worked in the district.

Do you know whether she worked the season through?

Yes, until it froze up. I made them turn the water out of the ditch. It froze all over the road.

That's all.

Cross-examination by Judge KNOWLES:

Mr. Carver, you don't think there was any work done on the claim in '81, on this direct ground?

Only cutting hay. I don't know about mining. It might have been because I went up there.

You know she didn't have any hands there?

She might have; I didn't know of any.

Now, if a person should fail to represent, what would be the result?

They would forfeit the ground, I suppose.

That would be the effect?

Yes, sir.

99 Is that fence there now?

Some of it is.

What portion?

The fence is there, but it is down. It has been down for the last year or two. The stock has been breaking in so much they can't keep it up.

Does that fence take in the ground in dispute?

Yes, sir; I think it took in the creek ground.

That in dispute? We might understand that now.

Mr. RANDOLPH: We claim that it does, Mr. Knowles.

Judge KNOWLES: This don't run up and take in that ground beyond where the smelter is — the fence don't?

I don't know how much it took in of the ground. It was his intention to fence in ground to raise hay on.

How far was the creek from the fence?

I don't know.

How far from the smelter?

Between the smelter and the creek.

How far from it—from that ditch?

Pretty close to the ditch. I don't know that it crossed the
100 ditch. It was right by the ditch. We set the fence so it would take in ground most valuable to raise hay on.

When was that fence first down?

That's a pretty hard question to answer. It has been down these last two or three winters.

That's all.

Redirect by Mr. RANDOLPH:

Mr. Carver, in representing, you say if they failed to do one day's work in the district they would forfeit the ground?

That was my view.

Well, suppose no one jumped the ground?

That would be good luck.

Well, would they forfeit the ground?

No, I suppose not; they might not loose the ground, but still it would be forfeited.

You never knew of a miner to forfeit his claim?

Nearly all of them worked their ground.

That's all.

Mrs. WOLVERTON, called and sworn, *and* testified as follows on the part of the plaintiffs:

Examined by Mr. DEWITT:

101 What is your name?
Margaret J. Daniels.
What was formerly your name?
Margaret J. Wolverton.
Do you remember the day this suit was commenced—it was in August?
Yes, sir.
Your name was Margaret J. Wolverton at that time?
No, sir—yes, it was.
Who was your former husband?
Nelson Wolverton.
When did he die?
In '79.
Do you remember the month?
Yes, sir; January.
Did he leave any children?
Yes; these three.
Who?
Eva Jane, William Arthur, and Nelson.
Are they all living now?
No, sir.
Which are living?
Eva Jane, Willie.
102 Are they the plaintiffs in this action?
Yes, sir.
Do you know anything of a purchase by your husband of some placer ground in Independence mining district, known as the Purcell ground?
Yes, sir. I have heard him speak of it.
Do you remember the numbers of the claims?
No, sir.
Do you know where the ground is situated?
Well, it would be pretty hard for me to state. It is on Silver Bow creek.
About what place?
I can't——
You know pretty near?
It is near the smelter.
The Colorado smelter?
Yes, sir.
When was it your husband purchased this ground?
In 1876.
Are you sure?
No; in '75, I guess.
103 Do you know yourself about his working that ground in the mining season of '76?
Yes, sir.

Did he work it all summer?
I can't tell exactly.
Did he work at mining in the district that season?
Yes, sir, he did; every week. Yes, sir.
Do you remember the summer of '77, whether he was mining in Independence mining district?
He was.
Do you remember the amount of work he did?
He worked all summer.
Every week?
Yes, sir; every week.
Do you remember in regard to the summer of '78?
Yes, sir.
Did he work that season?
Yes, sir.
Every week?
Yes, sir.
'78; then you say he died in January, '79?
Yes, sir.

104 In the summer of '79, do you know what was done, either by yourself or his administrator?

We had a company of Chinamen working there all summer. Yes, sir.
Every week?
Yes, sir.
During the mining season?
Yes, sir.
What about '80? What was done that summer?
We had a company of Chinamen working every season since he died.
In that district?
Yes, sir.
They worked the whole season?
Yes, sir.
Every week during the season?
Yes, sir.
Have you had anybody employed managing these Chinamen for you?
Yes, sir; my brother.
What is his name?
Wm. Thomas.
What are the ages of these children?

105 One is ten years old in August, and the other is 5.

Do you know whether there is any one else on this ground now—any buildings or anything?
I can't say.
You spoke of an institution down there in the neighborhood of this ground; don't you remember speaking of something?
Yes, sir; the smelter.
Was that built there with your consent?
No, sir.

Didn't you know something about it then?
Yes, sir.
Who was the superintendent of the smelter?
Mr. Williams.
Did you make any arrangement with Mr. Williams?
Yes, sir; he was to defend the ground for where the smelter stands.
Then you would give him some interest if he would defend the ground?
Yes, sir.
He is there with your consent?
Yes, sir.
Is he your tenant?

106 Mr. KNOWLES: We object to that.
Mr. DEWITT: All right.

That's all.

Cross-examined by Mr. KNOWLES:

How much of this ground is Williams to have?
Mr. DEWITT: What's that?
Judge KNOWLES: How much ground is Williams to have?
I can't say exactly; on the outside of the fence.
Well, when you made this arrangement with Mr. Williams did you know whether or not there was anybody claiming any of this ground?

Mr. DEWITT: I object to that; it is immaterial.
Judge KNOWLES: We don't claim any of this meadow ground, and I want you to know it.

Objection overruled.

Did Williams represent to you that parties were claiming this meadow ground?
Yes, sir.
And, to save your meadow ground, you agreed to give him what was outside of the fence?
Yes, sir.
You understood some parties claimed this meadow ground?

107 Yes, sir.
In this suit?

Yes, sir.
And it was necessary for you to bring this suit to save it?
Yes, sir.

That's all.

Redirect by Mr. DEWITT:

Wasn't that talk of this meadow ground last May?
No, sir; it was in the summer.
What time?
I don't know exactly.

Do you know whether there have been two suits?
I believe this is the second one.
Didn't you have this talk when the first suit was brought?
Yes, sir.
When the first suit was brought?
Yes, sir.

That's all.

Recross by Mr. FORBIS:

When did you make this arrangement?
108 I didn't make it with Mr. Williams, I made it with my father.
Mr. DEWITT. I wasn't quite done.
Mr. FORBIS: Wasn't you; I thought you said that's all; excuse me.
Mr. DEWITT: Did you ever see that instrument?

(Paper shown witness.)

That's my signature.
That's all.

(This instrument was not offered in evidence.)

Judge KNOWLES: Did he made this same representation to you when he commenced this suit?
I havn't seen Mr. Williams at all.
Did you claim any of that ground beyond your fence?
Yes, sir; I did, but don't now. I gave it away in order to save trouble.
Did you make a covenant?
Yes, sir; to Mr. Williams.
Mr. FORBIS: When?
I can't tell exactly.
Before or after the commencement of this action?
After.
109 After the commencement of this action?
Yes, sir.
Were you working on this ground in '81?
Yes, sir.
What time?
In the mining season.
On this particular ground?
Down below.
You did not work on this particular ground?
No, sir.
Did not work there at all in '81?
No, sir.
Mr. DEWIT: Did you ever see this instrument?

(Paper shown witness.)

Yes, sir.
Whose signature is that? (Pointing to signature on instrument.)
That is mine.

Mr. DEWITT: We offer in evidence this agreement.

Judge KNOWLES: No objection.

Instrument received in evidence and read to the jury as follows:

Know all men by these presents that I, Margaret J. Wolverton, widow of Nelson Wolverton, deceased, for myself, and as guardian for Eva Jane Wolverton and William Arthur Wolverton, infants under the age of twenty-one years, for and in consideration of the sum of one dollar to me in hand paid by the Colorado and Montana Smelting Company, and the further consideration of said company prosecuting to a successful conclusion the cause of J. R. Clark, administrator of the estate of Nelson Wolverton, deceased, *et al. vs.* Silas F. King, now pending in the district court in and for Silver Bow county, have covenanted and agreed, and by these presents do covenant and agree, to convey by a good and sufficient deed of conveyance, duly acknowledged, all that certain land bounded and described as follows: Beginning at a point on the easterly extremity of certain placer mining claims belonging to the estate of the said Nelson Wolverton, and located in Independence mining district, Silver Bow county, territory of Montana, in township No. 3 north, range No. 8 west, of the principal meridian, which said point is due east from the most southerly point of a certain fence running westerly therefrom along the general course of said Silver Bow creek; thence in a due west line from said point, touching the most southerly point of said fence, a distance of about thirteen hundred feet, to a point on the westerly extremity of placer mining claim number two hundred and thirty; thence from said point due south along the westerly boundary of said last-named placer claim to the most southerly boundary thereof; thence along the most southerly boundary of said placer mining claim and placer mining claims numbers 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, and 242, in an easterly direction, to the southeast corner of said placer mining claim number two hundred and forty-two; thence in a northerly direction from said corner to the point or place of beginning, it being intended to convey all that part of said placer mining claims numbered from two hundred and thirty to two hundred and forty-two, both inclusive, which lies south of the most southerly point of the fence first above mentioned; to have and to hold the same unto the said The Colorado and Montana Smelting Company, their successors and assigns, for their own benefit and behoof forever.

In witness whereof I have hereunto placed my hand and seal this 12 day of May, eighteen hundred and eighty-one.

MARGARET J. WOLVERTON. [SEAL.]
MARGARET J. WOLVERTON, [SEAL.]
As Guardian for Eva Jane Wolverton and William Arthur Wolverton.

In presence of—
CALEB E. IRVINE.

TERRITORY OF MONTANA, } ss:
County of Silver Bow, }

On this 12th day of May, A. D. 1881, personally appeared
113 before me, the undersigned, a notary public in and for said county of Silver Bow, Margaret J. Wolverton, personally known to me to be the person described in and who executed the foregoing instrument for herself and as guardian of Eva Jane Wolverton and William Arthur Wolverton, and who acknowledged to me that she executed the same for herself and as guardian, as aforesaid, freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Caleb E. Irvine, Notarial Seal, Montana.]

CALEB E. IRVINE,
Notary Public.

Endorsed: Filed for record May 21st, 1881, at 4.24 o'clock p. m. Recorded in book A, miscellaneous records, page 102, Silver Bow county, Montana T. A. C. Witter, county recorder.

114 Judge KNOWLES to (witness): When that other case was terminated you considered that you should convey to the Colorado smelter?

Mr. DEWITT: I object.

Judge KNOWLES: Now, as to this ground outside of your fence; you have not possession of it?

Mr. RANDOLPH: That is a legal conclusion, possession is.

Judge KNOWLES: You can ask questions right out as to possession. I will ask her if she was in possession of any of this ground that lies outside of the fence south?

Mr. RANDOLPH: To answer that question the witness will have to interpret the instrument. I object.

The COURT: The objection is overruled.

Mr. RANDOLPH: Note an exception.

Judge KNOWLES: Now, have you been in possession of any of that ground to the south of your fence since this suit was — the last suit with King?

115 Mr. DEWITT: We object, and you may note an exception.

No, sir; I have not.

Nothing to do with the ground there?

No, sir.

Since that suit you have been ready to make the Colorado smelter a deed?

Yes, sir.

Mr. DEWITT: We object to that, and you may note an exception.

KNOWLES: That is all.

M. D. THOMAS, called, sworn, and examined for the plaintiffs, testified as follows:

Examined by Mr. DeWitt:

Mr. Thomas, Where do you reside?
Deer Lodge Valley.
How long have you lived there?
Well, I have been there for two years.
Have you been in Independence mining district during any of that time?
Yes, sir.
How much?
During the summer season every week.
116 Since when?
Since 1880.
Did you know Nelson Wolverton?
Yes, sir.
When did he die?
1879.
Do you know anything of a purchase by Wolverton from Purcell
Yes, sir.
Do you know when that was?
Yes, sir.
When?
Well, I don't know when he bought it.
You don't know when he bought it?
No, sir.
I will call your attention to a deed from Purcell to Wolverton, dated November 8, 1875. Do you know the ground in dispute?
I know where it is.
You do?
Yes, sir.
Wolverton having purchased this ground in November, what do you know as to his taking possession?
117 I know he worked on it in '76—in the spring; I could not tell what month.
Was it in the mining season?
Yes, sir.
What did he do?
He worked the mines.
In all this ground here?
Yes, sir.
What did he do in the summer of '76?
He worked the placer ground, and in the fall he cut hay.
How much work did he do every week?
Every day in the week.
Were you working for him?
Yes, sir.
What do you know as to any work done there in '77?
He worked there.
During the mining season?
Yes, sir.
What did he do?

He worked all the mining season.
Do you remember what the mining season is?
Well, just as long as the water will run.
118 What did he do in '78 there?
Mined there.
Every week?
Yes, sir.
How much work did he do?
Worked every day in the week.
When did he die?
In '79.
What was done by Mr. Wolverton's representatives in '79?
Worked there, sir.
Who did the work?
Several men worked there in '79, and I did myself.
By whom were they employed?
By Mrs. Wolverton.
You worked there yourself?
Yes, sir.
How much work was done there?
Every week.
In '80 what was done there?
Well, I don't know that on that on that ground anything was done, but in the gulch there was.
In the gulch?
119 Yes, sir.
By whom?
I worked there myself and several others.
For whom?
Mrs. Wolverton.
How much work was done?
We worked the whole mining season.
In '81?
We worked there on this particular ground or in the district. In the district.
How much work was done there?
The whole mining season we worked.
Every day?
Yes, sir.
You made it a business?
Yes, sir.
During the summer of '82, what was done by Mrs. Wolverton last summer?
We worked there.
From the beginning right through?
Yes, sir.
Every week?
Yes, sir.
Oh! what summer did you mean by '82?
120 I said '82; I mislead you; what did you mean?
'81.

You understood last summer?
Yes, sir.
This work was done for Mrs. Wolverton?
Yes, sir.
You have mined there yourself some 6 or 7 years?
I have mined there since '77.
Do you know what the custom is in that district in regard to representing?
One day in the week on one claim represents the whole in that district.
And that to be done on the claim?
On any claim you please to work.
That's all.

Cross-examined by Mr. KNOWLES:

Did you do any work on that claim in '78?
Yes, sir.
Did you work there 3 years, from '76, '77, and '78?
Yes, sir.
Didn't you work below in '78?
I worked there in '78.
'77?
121 Yes, sir.
'76?
Yes, sir.
In '80 you worked below?
Yes, sir.
That's all.

AUGUST MITZ called for plaintiffs, and testified as follows:

Examined by Mr. RANDOLPH:

Where do you reside?
In Burlington.
What is your occupation?
Mining.
What kind?
It used to be placer.
Did you ever live in Independence mining district?
Yes, sir.
What time?
I came there in the spring of '65.
How long did you live there?
Since that time.
122 Do you know the customs in regard to representing?
Yes, sir.
What is it?
To work one day in each week during the season, from the first of May to October—one day in each week.
On what ground?

On any ground you own.

That's all.

No cross-examination.

HENRY WILLIAMS called for plaintiffs, and testified as follows:

Examined by Mr. RANDOLPH:

What is your occupation?

I am manager of the Colorado and Montana Smelting Co.

You have heard this agreement to convey read?

Yes, sir.

Has the Colorado and Montana Smelting Co. ever received a conveyance from Mrs. Wolverton in reference to this?

No, sir.

How long has the company been in possession and occupation of the premises they now occupy?

123 Since January, '79.

Will you indicate, sir, on that map where the smelter is?

There is the building; that is a machine building where we have crushers, &c. (Pointing to map in evidence.)

What is that?

That is the office.

Will you show that to the jury?

This is the north line; that's the building; the furnaces are there; the assay office there, and the crusher building is here south of this ground in dispute.

JUROR: Where is the creek?

Out here.

JUROR: That's the furnaces.

No, that's the ditch.

What are these dotted lines?

Here?

No, above.

Well, I can't say; that is all around the map. I can't say what it is; we have put wood from here to here.

Is that the furnaces?

124 There is the furnaces back of this ground. There is a 20-acre lot fenced in there.

Have you any wood piled there now?

Yes, sir.

How far back?

About 1,000 feet.

How long have you been using that for piling wood?

Ever since we started.

Is it necessary in connection with the smelter to have 1,000 feet back?

Yes, sir.

Have you been using that continuously since you have been there?

Yes, sir. I don't know what time in June we commenced. We

commenced getting wood in June, '79, and have been using it ever since.

Did you get an agreement from Mrs. Wolverton that she would allow you to use these premises?

Mr. KNOWLES: I object; you have that in writing.

125 Mr. RANDOLPH: In '79 did you get an agreement from Mrs. Wolverton that you might use these premises?

No, sir.

Did you in '80?

Well, I don't remember the date of the agreement; it was the only one we had.

This agreement to convey?

Yes, sir.

Mr. Williams, how far back did you say that fence was south of the smelter, about?

Well, in the neighborhood of 1,000 feet; maybe a little more and maybe a little less.

That's all.

Cross-examined by Judge KNOWLES:

Who put that?

The same parties connected with the Gagnon Mining Co.

You had nothing to do with it?

I simply bought it.

When was it put there?

I suppose somewhere in the fall of '78 or early part of '79.

Is it there yet?

Some.

126 Have you kept it up?

I have piled wood in places alongside of it; then we fenced it with wood instead of poles.

You have cord wood piled there?

Yes, sir.

Mr. Williams, the Colorado Smelting Co. is in possession of this ground, is it?

Well, yes, sir; it is supposed to be.

You are in possession. Do you claim title to it?

Mr. RANDOLPH: I object; the contract speaks for itself; it is a covenant to convey at some future time.

Mr. KNOWLES: Under this contract you were to defend the suit against Silas F. King?

Yes, sir.

Were you to do anything else?

Mr. DEWITT: I object to that; the contract speaks for itself.

If you will give me the contract I will tell you.

You did defend that suit?

I did.

It says something about one hundred dollars?

It is one dollar.

Well, now, you did defend that suit?

127 Yes, sir.

You are in possession of that ground?

We were in possession before and have been ever since; we are in the same position as we were before.

You have a contract to purchase?

We have a contract to convey at some future time.

You could have the title?

Maybe.

Did you demand the title?

I never demanded the title.

Why didn't you get your deed?

Well, that's a matter, I suppose, concerning myself; there is no reason why I shouldn't.

Are you paying the expenses of this litigation?

Mr. RANDOLPH: We object. Don't answer, Mr. Williams.

Mr. KNOWLES: I want to show that this widow and children are not in possession, and don't claim this ground this smelter Co. are in possession of.

Mr. RANDOLPH: How can this witness swear to that?

128 The COURT: Anything further from this witness?

Mr. KNOWLES: No, I think not.

The COURT: What is the question, Mr. Reporter?

REP.: The question was, "Are you paying the expenses of this litigation?"

The COURT: What is the objection?

Mr. RANDOLPH: How does this witness know. We might be doing it for nothing, as far as this witness is concerned.

Mr. KNOWLES: I don't care particularly about it, only I would like to show who is defending this suit.

Objection sustained.

That's all.

Recess for ten minutes.

Plaintiffs rest.

Mr. FORBIS: I desire to file a motion for nonsuit.

Motion read and court adjourned until to-morrow morning at 9 o'clock.

Court called at 9 o'clock.

The COURT: The motion for a nonsuit is sustained.

129 Mr. RANDOLPH: Plaintiffs move to have the nonsuit opened and move to amend their pleadings by making the Colorado and Montana Smelting Co. a party plaintiff.

The COURT: This motion will be overruled.

Mr. DEWITT: Note an exception to the ruling of the nonsuit and this ruling both.

130 TERRITORY OF MONTANA, } ss:
County of Silver Bow, }

I, George W. Irvine II, clerk of the 2d judicial court in and for the county of Silver Bow, Montana Territory, hereby certify that the foregoing and annexed statement on appeal in the cause of Eva J. Wolverton *et al. vs.* Erastus A. Nichols *et al.* was filed by plaintiffs and appellants, in my office, April 3, 1882, and that since said filing to this 10th day of April, 1882, no amendments to said statement have been filed by defendants and respondents.

Witness my hand and the seal of said court this 10th day of April, 1882.

[Dist. Court Seal.]

GEO. W. IRVINE II, *Clerk.*

TERRITORY OF MONTANA, } ss:
County of Silver Bow, }

I, William J. Galbraith, judge of the 2d judicial district court in and for the county of Silver Bow, Territory of Montana, do
131 hereby certify that I have examined the foregoing and annexed statement on appeal in the cause of Eva J. Wolverton *et al., vs.* Erastus A. Nichols *et al.*, and that the same is hereby settled, and has been allowed and is correct.

Dated April 13, 1882.

(Signed) WM. J. GALBRAITH,
Judge 2d Judicial District, County of Silver Bow, Montana.

TERRITORY OF MONTANA, } ss:
County of Silver Bow, }

I, George W. Irvine II, clerk of the second judicial court in and for Silver Bow county, Montana Territory, do hereby certify that the foregoing transcript of the summons, the complaint, the demurrer to the complaint, the answer, the replication, the motion for nonsuit, the order granting the motion for a nonsuit, the motion to set aside the nonsuit and for leave to amend the complaint, the order refusing the motion to set aside the nonsuit, the order
132 directing judgment on the nonsuit, the opinion of the court, the judgment and decree, the notice of appeal and admission of defendants' attorneys of due service of the same, the undertaking on appeal, the notice of filing statement on appeal, the admission of defendants' attorneys of due service of the same, the statement on appeal, the certificate of the clerk of the court of the filing of the same, and that no amendments were filed by defendants' attorneys, and the certificate of the judge settling said statement in the cause of Eva J. Wolverton *et al. vs.* Erastus A. Nichols *et al.* is a full, true, and correct copy of all the papers and proceedings in said cause, as appears of record in my office.

Witness my hand and seal of said court this 30th day of June, A. D. 1882.

[Seal of Dist. Court.]

GEO. W. IRVINE II, *Clerk.*

Filed in sup. court Aug. 14, 1882.

I. R. ALDEN, *Clerk.*

133 *Appeal from Silver Bow County, Second Judicial District.*

In the Supreme Court of Montana Territory. August Term, 1882.

EVA JANE WOLVERTON *et al.*, Appellants,

vs.

ERASTUS A. NICHOLS *et al.*, Respondents.

Be it remembered that in the present term of August, A. D. 1882, the above-entitled cause was brought into the supreme court of the Territory of Montana by virtue of an appeal from the judgment of nonsuit, made and entered therein in the said district court on the 25th day of March, 1882, agreeably to the statutes of said Territory and the rules and practice of said supreme court in such case made and provided, and by filing the transcript of the record of said district court in said cause in the office of the clerk of this supreme court.

134 And afterwards, to wit, in the said August term, said cause came on to be heard before the court on the said transcript of record, and was argued orally and in writing by counsel. Whereupon the court took said cause under advisement until the next or January, A. D. 1883, term of the court.

And afterwards, to wit, on the sixth day of January, A. D. 1883, said cause came on for decision and judgment on appeal, whereupon the court delivered its opinion in said cause in writing, of which the following is a true copy viz:

Appeal from Second District, Silver Bow County.

In the Supreme Court of Montana Territory. January Term, 1883.

EVA JANE WOLVERTON *et al.*, Appellants,

vs.

ERASTUS A. NICHOLS *et al.*, Respondents.

Opinion of court by WADE, chief justice:

135 Action under the 2326th section of the Revised Statutes of the United States, to have determined the right to the possession of mining claims must be instituted according to the forms and practice within the jurisdiction where the suit is commenced.

In this Territory, in such cases, if the plaintiff is in possession, he brings his action to quiet title; if he is not in possession, his action is in the nature of ejectment. In the former case the plaintiff must allege and prove possession; in the latter he maintains his action if he establishes his right.

This complaint belongs to the former class. The plaintiffs allege that they are the owners and in the possession of certain placer mining claims situate in Independence mining district, Silver Bow

county; that the defendants have applied for a patent to certain portions of said claims; that the plaintiffs have filed their protest, and bring this action to have title and possession decreed to them.

The defendants deny the title and possession of plaintiffs; and deny that the ground for which they have applied for a patent is any part or portion of the plaintiffs' claims.

136 Under this issue it was necessary for the plaintiffs to prove that at the date of the commencement of the action they, by themselves or tenants, were in the actual possession of the claims in question. Our Code of Civil Procedure provides, section 354:

"An action may be brought by any person in possession, by himself or his tenant, of real property against any person who claims an estate or interest therein adverse to him for the purpose of determining such adverse claim, estate, or interest."

This section of the code determines the character of action to be instituted to have adjudicated the right to the possession of a mining claim where the one claiming the right is in possession and another sets up an adverse claim, estate, or interest in the property; and it also points out one of the necessary elements of the plaintiff's case in order to maintain the action, viz., actual possession at the date of the commencement of the action.

See Lyle *vs.* Robbins, 25 Cal., 437.
Brooks *vs.* Calderwood, 34 Cal., 563.

137 Sapeloeda *vs.* Sapeloeda, 39 Cal., 13.

The testimony shows that the plaintiffs were not in possession of the ground in controversy at the date of the commencement of the action. Prior to that time they had entered into an agreement and covenant to convey to the Colorado and Montana Smelting Company, the validity of which agreement is not questioned by either party. The company had taken possession in pursuance of such covenant; had paid the full consideration mentioned therein, and stood in a position to compel a conveyance, as provided for in the covenant to convey. The purchase-price having been fully paid, the plaintiff testified that she was ready to convey to the smelting company long before this action was commenced. It follows, therefore, that the plaintiffs, besides being out of the possession of the ground in question, are not the real parties in interest, and had not the right or capacity to maintain this action.

Furthermore, it is not shown by the proof that the ground
138 claimed by defendants is in conflict with that claimed by plaintiffs.

See Sandiago *vs.* Allison, 46 Cal., 162.
San Francisco *vs.* Ellis, 54 Cal., 73.
Blosdell *vs.* Williams, 9 Nev., 161.
King *vs.* French, 2 Saw., 441.
Stark *vs.* Staus, 6 Wall., 402.

The motion for nonsuit was properly sustained and the judgment is affirmed with costs.

D. S. WADE, *Chief Justice.*
E. J. CONGER, *Asso. Justice.*
WM. J. GALBRAITH, *Asso. Justice.*

Filed & entered Jan'y 6, 1883.

J. R. ALDEN, *Clerk.*

Thereupon judgment on appeal in said cause was rendered in the words and figures following, to wit:

139 *Judgment on Appeal.*

In Supreme Court of Montana Territory. January Term, A. D. 1883.

EVA JANE WOLVERTON and WILLIAM ARTHUR WOLVERTON, Infant Heirs of the late Nelson Wolverton, Deceased, by Margaret J. Wolverton Daniels, their Guardian and next Friend, and Margaret J. Wolverton Daniels, Plaintiffs, Appellants,

vs.

ERASTUS A. NICHOLS and CHARLES O. FULLER, Defendants, Respondents.

Whereas, in the August term, A. D. 1882, of said supreme court, this cause came on to be heard before the court on the transcript of the record of the court below filed herein, and was argued by counsel, whereupon the court took the same under advisement; and whereas, at the January term, A. D. 1883, of this court, said cause came on for decision and judgment on appeal, whereupon the court delivered its opinion in writing in said cause, whereupon it

140 is now here ordered and adjudged by this court that the judgment and decree of the court below entered in said cause on the 25th day of March, A. D. 1882, be, and the same is hereby, affirmed with costs.

And it is hereby further ordered and adjudged by this court that said defendants and respondents, Erastus A. Nichols *et al.*, recover against said plaintiffs and appellants, Eva Jane Wolverton *et al.*, — dollars for their costs herein expended, and have execution therefor.

6th January, A. D. 1883.

And afterwards, said cause coming on to be heard on the application for an order of this court fixing the amount of the bond to be given by appellants on appeal from said judgment in affirmance to the Supreme Court of the United States, and the allowance of a writ of error herein, it is ordered by the court that said bond be in the sum of one thousand dollars, and that said writ of error be allowed.

141 And afterwards, to wit, on the 24th day of January, A. D. 1883, said appellants filed herein their writ of error, of which the following is a copy, viz:

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the Territory of Montana for the district of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you in a cause between Eva Jane Wolverton and William Arthur

county; that the defendants have applied for a patent to certain portions of said claims; that the plaintiffs have filed their protest, and bring this action to have title and possession decreed to them.

The defendants deny the title and possession of plaintiffs; and deny that the ground for which they have applied for a patent is any part or portion of the plaintiffs' claims.

136 Under this issue it was necessary for the plaintiffs to prove that at the date of the commencement of the action they, by themselves or tenants, were in the actual possession of the claims in question. Our Code of Civil Procedure provides, section 354:

"An action may be brought by any person in possession, by himself or his tenant, of real property against any person who claims an estate or interest therein adverse to him for the purpose of determining such adverse claim, estate, or interest."

This section of the code determines the character of action to be instituted to have adjudicated the right to the possession of a mining claim where the one claiming the right is in possession and another sets up an adverse claim, estate, or interest in the property; and it also points out one of the necessary elements of the plaintiff's case in order to maintain the action, viz., actual possession at the date of the commencement of the action.

See Lyle *vs.* Robbins, 25 Cal., 437.
Brooks *vs.* Calderwood, 34 Cal., 563.
137 Sapeloeda *vs.* Sapeloeda, 39 Cal., 13.

The testimony shows that the plaintiffs were not in possession of the ground in controversy at the date of the commencement of the action. Prior to that time they had entered into an agreement and covenant to convey to the Colorado and Montana Smelting Company, the validity of which agreement is not questioned by either party. The company had taken possession in pursuance of such covenant; had paid the full consideration mentioned therein, and stood in a position to compel a conveyance, as provided for in the covenant to convey. The purchase-price having been fully paid, the plaintiff testified that she was ready to convey to the smelting company long before this action was commenced. It follows, therefore, that the plaintiffs, besides being out of the possession of the ground in question, are not the real parties in interest, and had not the right or capacity to maintain this action.

Furthermore, it is not shown by the proof that the ground
138 claimed by defendants is in conflict with that claimed by plaintiffs.

See Sandiago *vs.* Allison, 46 Cal., 162.
San Francisco *vs.* Ellis, 54 Cal., 73.
Blosdell *vs.* Williams, 9 Nev., 161.
King *vs.* French, 2 Saw., 441.
Stark *vs.* Staus, 6 Wall., 402.

The motion for nonsuit was properly sustained and the judgment is affirmed with costs.

D. S. WADE, *Chief Justice.*
E. J. CONGER, *Asso. Justice.*
WM. J. GALBRAITH, *Asso. Justice.*

Filed & entered Jan'y 6, 1883.

J. R. ALDEN, *Clerk.*

Thereupon judgment on appeal in said cause was rendered in the words and figures following, to wit:

139 *Judgment on Appeal.*

In Supreme Court of Montana Territory. January Term, A. D. 1883.

EVA JANE WOLVERTON and WILLIAM ARTHUR WOLVERTON, Infant Heirs of the late Nelson Wolverton, Deceased, by Margaret J. Wolverton Daniels, their Guardian and next Friend, and Margaret J. Wolverton Daniels, Plaintiffs, Appellants,

vs.

ERASTUS A. NICHOLS and CHARLES O. FULLER, Defendants, Respondents.

Whereas, in the August term, A. D. 1882, of said supreme court, this cause came on to be heard before the court on the transcript of the record of the court below filed herein, and was argued by counsel, whereupon the court took the same under advisement; and whereas, at the January term, A. D. 1883, of this court, said cause came on for decision and judgment on appeal, whereupon the court delivered its opinion in writing in said cause, whereupon it

140 is now here ordered and adjudged by this court that the judgment and decree of the court below entered in said cause on the 25th day of March, A. D. 1882, be, and the same is hereby, affirmed with costs.

And it is hereby further ordered and adjudged by this court that said defendants and respondents, Erastus A. Nichols *et al.*, recover against said plaintiffs and appellants, Eva Jane Wolverton *et al.*, — dollars for their costs herein expended, and have execution therefor.

6th January, A. D. 1883.

And afterwards, said cause coming on to be heard on the application for an order of this court fixing the amount of the bond to be given by appellants on appeal from said judgment in affirmance to the Supreme Court of the United States, and the allowance of a writ of error herein, it is ordered by the court that said bond be in the sum of one thousand dollars, and that said writ of error be allowed.

141 And afterwards, to wit, on the 24th day of January, A. D. 1883, said appellants filed herein their writ of error, of which the following is a copy, viz:

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the Territory of Montana for the district of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you in a cause between Eva Jane Wolverton and William Arthur

Woverton, infant heirs of the late Nelson Wolverton, deceased, by Margaret J. Wolverton Daniels, their guardian and next friend, and Margaret J. Wolverton Daniels, plaintiffs, and Erastus A. Nichols and Charles O. Fuller, defendants in error, a manifest error hath happened, to the great damage of the said Eva Jane Wolverton and William Arthur Wolverton, infant heirs of the late Nelson
142 Wolverton, deceased, by Margaret J. Wolverton Daniels, their guardian and next friend, and Margaret J. Wolverton Daniels, plaintiffs in error, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein: to correct that error what of right and according to the laws and customs of the United States should be done.

Witness Honorable Morrison R. Waite, Chief Justice of
143 said Supreme Court, this twenty-fourth day of January, in the year of our Lord one thousand eight hundred and eighty-three.

[Seal of Sup. Court, M. T.]

ISAAC R. ALDEN,
Clerk of the Supreme Court of Montana Territory.

Allowed in open court January 10, 1883.

D. S. WADE,
Chief Justice.

And afterwards, to wit, on the 24th day of January, A. D. 1883, said appellants & plaintiffs in error filed their undertaking to accompany said writ in words & figures following, viz:

In Supreme Court of the United States of America.

EVA JANE WOLVERTON and WILLIAM ARTHUR WOLVERTON, Infant Heirs of the late Nelson Wolverton, Deceased, by Margaret J. Wolverton Daniels, their Guardian and next Friend, and Margaret J. Wolverton Daniels, Plaintiffs and Appellants,

against

ERASTUS A. NICHOLS and CHARLES O. FULLER, Defendants & Respondents.

144 Know all men by these presents that we, Aaron Hershfield and Israel Salhinger, of Helena, Montana, are held and firmly bound unto Erastus A. Nichols and Charles O. Fuller in the sum of one thousand dollars, lawful money of the United States, to be paid to the said Erastus A. Nichols and Charles O. Fuller,

their or either of their executors or administrators; to which payment, well and truly to be made, we bind each of us, jointly and severally, and our heirs and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals and dated the 12th day of January, 1883.

Whereas the above-named Eva Jane Wolverton and William Arthur Wolverton, infant heirs of Nelson Wolverton, deceased, and Margaret J. Wolverton Daniels have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the supreme court of the Territory of Montana:

Now, therefore, the consideration of this obligation is such
145 that if the above-named Eva Jane Wolverton and William Arthur Wolverton, infant heirs aforesaid, and Margaret J. Wolverton Daniels shall prosecute the writ of error aforesaid to effect and answer all damages and costs if they fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

AARON HERSHFIELD. [SEAL.]
ISRAEL SALHINGER. [SEAL.]

Sealed & delivered in presence of—the words "is such," on the 1st line of the 3rd page, having been first erased—

Witness:
H. B. WILKINS, JR.

TERRITORY OF MONTANA, }
County of Lewis & Clarke, } *ss:*

Aaron Hershfield and Israel Saltinger, being first duly sworn, on their oaths say, each for himself and not one for the other,
146 that he is worth the sum of one thousand dollars over and above all of his debts and liabilities and property exempt by law from execution, levy, and sale under the same.

AARON HERSHFIELD.
ISRAEL SALTINGER.

Subscribed and sworn to before me this 12th day of January, 1883.

H. B. WILKINS, JR.,
Notary Public, Montana.

And on the same day said appellants filed their citation herein, which, with affidavit of service endorsed thereon, the following is a copy, viz:

119/485

Office Supreme Court U. S.
FILED.
APR 7 1886
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1885.

EVA JANE WOLVERTON AND WILLIAM ARTHUR WOLVERTON, infant heirs of the late Nelson Wolverton, deceased, by Margaret J. Wolverton Daniels, their guardian and next friend, and MARGARET J. WOLVERTON DANIELS,
Plaintiffs in Error,

vs.

ERASTUS A. NICHOLS and CHAS. O. FULLER,
Defendants in Error.

No. 311.

Brief for Plaintiffs in Error.

EDWARD O. WOLCOTT,
Attorney for Plaintiffs in Error.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1885.

EVA JANE WOLVERTON AND WILLIAM ARTHUR WOLVERTON, infant heirs of the late Nelson Wolverton, deceased, by Margaret J. Wolverton Daniels, their guardian and next friend, and MARGARET J. WOLVERTON DANIELS,
Plaintiffs in Error,

vs.

ERASTUS A. NICHOLS and CHAS. O. FULLER,
Defendants in Error.

No. 311.

Brief for Plaintiffs in Error.

This complaint belongs to the class of cases where a plaintiff in possession brings his action to quiet title. "The plaintiffs allege that they are the

"owners and in the possession of certain placer mining "claims situate in Independence Mining District, Silver "Bow County, Montana; that the defendants have "applied for a patent to certain portions of said claims; "that the plaintiffs have filed their protest and bring "this action to have title and possession decreed to "them. The defendants deny the title and possession "of plaintiffs; and deny that the ground for which they "have applied for a patent is any part or portion of the "plaintiffs' claims." But it appears from the pleadings that the defendants are threatening to interfere with the title and possession of the plaintiffs to the premises in controversy.

These premises are parts of placer mining claims 237, 238, 239, 240, 241 and 242. A reference to the official plat (Transcript, p. 28) will show their position. The east line of claim 242 is practically identical with the eastern red line bounding the parallelogram marked "Placer Mine claimed by Margaret Wolverton." It is to be observed that this parallelogram by no means shows the full extent of the Wolverton claims. The west line of claim 237 is practically identical with the western black line of the much smaller parallelogram marked "Placer Mines, Mineral Application, No. 944, "claimed by Erastus A. Nichols and Charles O. Fuller."

Between these two lines lie the six claims, each one hundred feet in width. The length of the claims is from north to south, at right angles to Silver Bow Creek, and they stretch at either end to the foot-hills; technically speaking, the "length" is the hundred feet in the other direction, up and down the gulch, according to the by-laws of the miners, which read: "Placer "claims shall consist of one hundred feet in length, "extending up the creek or gulch, extending upon "either side of the banks to the second rise of the bed-"rock." (Transcript, pp. 20, 25.)

The tract marked "Area in Conflict" on the plat, is covered then by claims 237-242 inclusive, running from the creek back to the foot-hills.

The position of the claims, as above stated, is proved by the evidence given as to the water wheel, which was shown to be on claim 248 (Transcript, pp. 18, 28), as well as by the evidence of the surveyor (Transcript, pp. 27, 28) who made the official plat, and who identified the boundaries of defendants' location as in conflict with plaintiffs' claims.

The history of the case is briefly as follows:

Locations were duly made upon these claims according to the customs and rules of miners, in the years 1866, 1868 and 1869:

Transcript.

p18 Claim 237, located by C. C. Pierce, June 15, 1868.

18 Claim 238, located by A. B. Chitic, Aug. 1, 1868.

18 Claim 239, located by Wm. Lanson, July 19, 1869.

19 Claim 240, located by John Manning, May 1, 1866.

19 Claim 241, located by Robert Currie, May 1, 1866.

19 Claim 242, located by John Currie, May 1, 1866.

CONVEYANCES.

Of claim 237, by C. C. Pierce to Thos. Manning, by parol.

22 Of claim 238, by A. B. Chitic to Thos. Manning, by deed, May 31, 1869.

23 Of claim 239, by Wm. Lanson to Thos. Manning, by deed, July 29, 1869.

Of claim 240, by John Manning to Thos. Manning, by parol.

30 Of claim 241, by Robert Currie to Jos. H. Reilly, by parol.

30 Of claim 242, by John Currie to Jos. H. Reilly, by parol.

29 Of claim 237, by Thos. Manning to Tom Purcell, by deed, December 4, 1869.

29 Of claim 238, by Thos. Manning to Tom Purcell, by deed, December 4, 1869.

29 Of claim 239, by Thos. Manning to Tom Purcell, by deed, December 4, 1869.

29 Of claim 240, by Thos. Manning to Tom Purcell, by deed, December 4, 1869.

30 Of claim 241, by Jos. H. Reilly to John Purcell, by deed, May 2, 1868.

30 Of claim 242, by Jos. H. Reilly to John Purcell, by deed, May 2, 1868.

All of these claims were conveyed by Tom and
33 John Purcell to Nelson Wolverton, the ancestor of the plaintiffs, by deed, November 8, 1875.

There is ample evidence to show that the claims, from the dates of location to the commencement of this suit, were worked or fully represented in accordance with the rules and regulations of miners.

The tables given above show that for claims 238 and 239, which run nearly through the middle of the disputed ground, the plaintiffs have a complete chain of deeds from the original locators.

As to the other claims, the record title, prior to 1869, is incomplete, owing, probably, to parol transfers.

Abundant proof, however, that the plaintiffs' grantors were in the actual possession of all of these claims, and exercised proprietary rights over them, under color of title, for more than twelve years prior to the inception of the defendants' claim of title, is supplied. (Transcript, pp. 17, 28, 30, 32, 33, 34, 36, 37, 38, 46.)

Nelson Wolverton after working these claims from 1875 to 1879, died in January of the latter year. (Transcript, p. 40.) The plaintiffs, his widow and minor children, succeeded to all his rights in the premises,

and their title therefore, barring that of the United States, is paramount.

In January, 1879, the plaintiffs made a demise of land that included the premises in controversy to the Colorado and Montana Smelting Company, and the company thereupon entered and proceeded to make improvements and erect valuable buildings—a smelter, roaster, assay office, and others—relying upon the protection that the plaintiffs' title gave.

This condition of affairs continued for more than two years without any disturbance occurring to the title of the plaintiffs or the possession of their tenants, the company.

Then the company, being desirous of acquiring the plaintiffs' title, if upon investigation it should prove a valid one, accepted from them a covenant for a conveyance, thereby expressly conceding, if that were necessary, the plaintiffs' ownership of the ground occupied by the company, and the subordination of such occupation to plaintiffs' title.

The land described in the covenant is much more extensive than the premises in dispute, extending from the ditch shown upon the plat on the north to the base of the foothills, one thousand feet or more to the south. The consideration of the covenant was an agreement on the part of the company to defend a suit that had been begun by one King against the administrator of the estate of Nelson Wolverton.

The covenant was executed May 12th, 1881, but no deed has ever been given in pursuance of it, for after a very short time,—before the validity of the title that the plaintiffs could convey could be investigated,—that title was put in issue by the mineral application for United States patent filed by defendants and covering the premises in dispute.

This land is no longer of special value for placer

mining, and it is hard to imagine the motive of the defendants in making the application, unless it be to make a profit out of the valuable improvements the company has put upon the land.

The application of the defendants for United States patent was duly adversed by the plaintiffs, and the present suit instituted September 13th, 1881.

This fact, that the suit was instituted by the plaintiffs, shows conclusively that it was the opinion not merely of the plaintiffs but of the company, that the possession, as well as the title, still remained in the plaintiffs. It is exactly in line with the covenant for conveyance, and proves that the occupation of the company was in subordination to the plaintiffs' title; that the possession was in subservience to the plaintiffs; in short, that the possession of the company was the possession of the plaintiffs.

On the twentieth of March, 1882, the cause came to trial. The plaintiffs proved their locations made in accordance with the customs and by-laws of miners; proved compliance with all other mining regulations; proved possession through their tenants and agents—the Colorado and Montana Smelting Company—and rested.

The defendants introduced no evidence, and made no attempt to show the position of the second rise of the bed-rock or to contradict the allegations of the complaint, that the placer claims extended to the base of the foothills, but moved for a non-suit, and the motion was sustained. The case at bar arises upon a motion to set aside this non-suit.

I.

The form of action is the usual one for the possession of mining property, where one party has applied for United States patent and the other has ad-

versed and brought his action pursuant to the requirements of § 2326, R. S. U. S.

Action under this section "to determine the question of the *right of possession*" must be instituted according to the practice of the jurisdiction where the suit is begun.

The Code Civ. Proc. Mont. T. § 354 provides that "An action may be brought by any person in possession, by himself or his tenant, of real property against "any person who claims an estate or interest therein "adverse to him for the purpose of determining such "adverse claim, estate or interest."

The statutes were identical in California (Practice Act, § 254) and in Nevada (Practice Act, § 256).

This statute seems to be an extension of a pre-existing remedy (in equity) to a new class of cases, where previously bills of peace would not lie for the quieting of title. Formerly to the prosecution of bills of this class, the concurrence of three particulars was essential,—the possession in the plaintiff, the disturbance of that possession by *legal* proceedings on the part of the defendant, and the establishment of the right of the plaintiff by judgment in his favor in such proceedings.

Under this statute " it is sufficient if, whilst in the "possession of the property, a party out of possession "claim an estate or interest adverse to him. He can "immediately, upon knowledge of the assertion of such "claim, require the nature and character of the adverse "estate or interest to be produced, exposed and "judicially determined, and the question of title be "thus forever quieted."

Curtis vs. Sutter, 15 Cal. 259, at p. 263.

Cited with approval, and the language quoted almost *verbatim* in

Stark vs. Starrs, 6 Wall. at p. 410.

A. This construction of the statute obviously makes it necessary for the plaintiff to make out only a *prima facie* case, and throws the burden upon the defendant of establishing his "adverse estate or "interest." One of the reasons urged as a cause for the non suit was that the plaintiffs had introduced no proof as to where the second rise of the bed-rock is located, and the claims were not shown to include the ground in dispute. But it was not necessary for the plaintiffs to allege and prove the negative fact that the second rise of the bed-rock lay outside of and beyond the land in dispute. That is a part of the defendants case. Inasmuch as the U. S. Mineral Laws give to each mineral claimant twenty acres to the claim, unless restricted by the local mining rules, it was for the defendants to show that the plaintiffs were so restricted by the second rise of the bed-rock if they sought to impeach the plaintiffs' title on that ground.

"It is our opinion that, under a proper construc-"tion of this statute, it is not necessary for the plaintiff "to set out specifically the character of the adverse "claim, and that the burden is upon the defendant, if he "admits plaintiffs' possession, or does not disclaim, to "plead and prove a good title in himself."

Scorpion Co. vs. Marsano, 10 Nev. 370, 379.

In this case the Supreme Court of Nevada expressly and emphatically *overrule* the case of

Blasdell vs. Williams, 9 Nev. 161

which is cited as authority in the case at bar by the Supreme Court of Montana.

Scorpion Co. vs. Marsano was affirmed in

Golden Fleece Co. vs. Cable Con. Co., 12 Nev. at p. 320.

Rose vs. Richmond M. Co., 17 Nev. at p. 52.

So, in Crook vs. Forsyth, 30 Cal., 662, the complaint set up adverse claim without stating it; the

answer admitted plaintiff's possession and set up the particulars of the defendant's alleged title; and it was *held* that the burden of proof was cast upon the defendant.

In Niagara M. Co. vs. Bunker Hill M. Co., 59 Cal., 612, an action to quiet title, the court say:

"The title was purely a possessory one, and the "plaintiff having proven possession of the mining "ground, made out all the title required by the law to "entitle it to the relief demanded."

See also, Horn vs. Jones, 28 Cal., 194, 203.
Pralus vs. P. G. & S. M. Co., 35 Cal., 30, 34.
Lebanon M. Co. vs. Con. Rep. M. Co., 6 Colo., 371, 381.

In the last case the court say:

"This is a possessory action, and proof of pos- "session of a mining claim is always *prima facie* evi- "dence of title. It is presumptive of the ownership "declared on, and until overcome by evidence of a "superior character, is sufficient to maintain the action."

Sears vs. Taylor, 4 Colo., 38.

To the same effect is Campbell vs. Rankin, 99 U. S., 261, 262.

"In actions of ejectment or trespass *quare clausum* "*fregit*, possession by the plaintiff at the time of evic- "tion has always been held as *prima facie* evidence of "the legal title, and as against a mere trespasser it is "sufficient. 2 Greenleaf Evid., § 311. If this be the "law where the right of recovery depends on the strict "legal right in the plaintiff, how much more appro- "priate is it as evidence of the superior right of pos- "session under the acts of Congress which respect such "possession among miners."

See also, 1 Greenl. Evid. (14th Ed.), § 74, note a.

This doctrine is but a special application of the general rule that "the burden of proof as to any par-"ticular fact lies on that person who wishes the court "to believe in its existence."

Steph. Dig. Evid., Art. 96.

B. Had the defendants' introduced evidence to rebut this *prima facie* case of the plaintiffs, the issue would have been on the question,—Who had the better right—the right to possession?

It is to be remembered that there is no absolute legal title to be taken into account; that is still outstanding in the United States. The question is purely one of possession under mining claims.

"Congress has seen fit to make the possession of "that part of the public lands which is valuable for "minerals separable from the fee, and to provide for the "existence of an exclusive right to the possession, "while the paramount title to the land remains in the "United States."

Belk vs. Meagher, 104 U. S., 279, 283.
Chambers vs. Harrington, 111 U. S., 350, 353.

"The question to be settled by judicial determin-"ation, so far as he [the plaintiff] is concerned, is as "to his own right of possession. He must establish a "possessory title in himself."

Gwillim vs Donellan, 115 U. S., 45, 50.

When the term "title" is used, it must be remembered that it is this *possessory title* only that is meant, and not legal ownership. Consequently, cases are not in point that involve the determination of the question in whom the strict legal title is, as in the ordinary case of ejectment or action to quiet title of real estate. This distinguishes the cases of Parrish vs. Ferris, 2 Black, 606, and Stark vs. Starrs, 6 Wall., 402, where similar statutes were construed.

In the latter case the court say: "We do not, "however, understand that the mere naked possession "of the plaintiff is sufficient to authorize him to insti- "tute the suit, and require an exhibition of the estate "of the adverse claimant."

So in the California cases, also cited and relied upon by the Supreme Court of Montana, the decision turned upon the adjudication of questions of strict legal title, and of the possession necessary to support such title in lands not mineral.

Such decisions must be limited in their application to the class of cases then before the court; they have no bearing on cases like the present—mining claims, where the paramount legal title is in the United States, and "the controversy involves only such pos- "sessory right as the act of Congress recognizes in the "locator and occupant of a mining privilege."

Campbell vs. Rankin, 99 U. S., 261, 262.

"Ejectments for mining claims, where neither "party has, strictly speaking, any legal title, but both, "in strict law, are intruders upon what belongs to "another, are mere contests for possession. * * * "Practically, the real question involved in all such "cases is, which, as against the other, has the better "right to mine the land in question."

Richardson vs. McNulty, 24 Cal., 339, 348.
Pralus vs. Pac. G. & S. M. Co., 35 Cal., 30, 34.

See also,

Antoine Co. vs. Ridge Co., 23 Cal., 219, 222.

In the last case the court say:

"The particular kind or character of title claimed "by the plaintiff was immaterial, so that they proved a "better and superior right and title to the possession "of the premises than that of the defendants. * * * "It was not necessary to prove a transfer of the title

"by written conveyances; but a parol transfer, with a "delivery of the possession, was sufficient."

To the same effect—that a sale by parol by one in possession of a mining claim, accompanied by transfer of possession, transfers the title,—see

Gatewood vs. McLaughlin, 23 Cal. 178.
Patterson vs. Keystone M. Co., ibid. 575.
Mining Company vs. Taylor, 100 U. S. 37.

"The only sensible construction of the law is, "that each party must prove his claim to the premises "in dispute, and that the better claim must prevail. "* * * A right to the possession was all it was "essential for the plaintiff to prove."

Golden Fleece Co. vs. Cable Con. Co., 12 Nev., 312, 321

affirmed

Rose vs. Richmond M. Co., 17 Nev. 25, 52.

See also

Schissler vs. Cheshire, 7 Nev. 427, 433.

The character of the possession that it is necessary to show to make out this "better claim," is not of the same kind that is required for lands not mineral the requirements are not so strict. "Mining claims "are held by possession, but that possession is regu- "lated and defined by usage and local conventional "rules, and the 'actual possession' which is applied to "agricultural lands, and which is understood to be a "*possessio pedis*, can scarcely be required in a mining "claim in order to give a right of action for the inva- "sion of it."

Attwood vs, Fricot, 17 Cal. 37, 43.

"A party may be in possession by himself, or by "his agents or servants."

English vs. Johnson, 17 Cal. 107, 116.

See also

Patterson vs. Keystone M. Co., 23 Cal. 575.

II.

For the purposes of this action the possession of the Colorado and Montana Smelting Company was the possession of the plaintiffs.

The company had taken possession originally by permission of the plaintiffs in January, 1879, and had continued in possession for more than two years, continually recognizing the subordination of that possession to the plaintiffs; before this action was brought the company had expressly conceded the ownership of plaintiffs and had acknowledged the subservience of its occupation to the plaintiffs, by the acceptance of the covenant for a conveyance.

There are two possible views as to the legal position of the company under these circumstances:— A. That the company was the tenant at will of the plaintiffs. B. That the company was a licensee, and that its possession was held by license of the plaintiffs.

Under either of these views, the possession of the one was legally the possession of the other.

A. The company was the tenant at will of the plaintiffs.

"When one enters upon land by permission of the "owner, for an indefinite period, even without the "reservation of any rent, he is by implication of law a "tenant at will.

"If he be placed upon the land as a mere occu- "pier, without any term prescribed or rent reserved, he "is by implication of law a tenant at will."

Larned vs. Hudson, 60 N. Y., 102, 104, and cases cited.

Wood on Landl. and Ten., 7, 30.

In the case at bar there was the further fact that the "occupier" had become a covenantee in a covenant for conveyance of the land.

"There is no doubt but that if there be an agree-"ment to purchase, and the intended purchaser is there-"upon let into possession, such possession is lawful, "and amounts at law, strictly speaking, to a bare "tenancy at will. Right d. Lewis vs. Beard, 13 East, "210."

Parke, B., in

Doe d. Gray vs. Stanion, 1 M. & W., 695, 700.

See also, Ball vs. Cullimore, 2 Cr. M. & R., 120, 122.

"There is much authority in favor of the position "that one who is let into possession under a contract "to purchase, is strictly a tenant at will."

Harris vs. Frink, 49 N. Y., 24, 32, and cases cited.

In Massachusetts, unquestionably one who is in possession of land under contract for a deed, intended to be executed and delivered as soon as the title can br examined and the deed prepared, is regarded as a tenant of the vendor, while the contract remains in force and unexecuted.

"In Gould vs. Thompson, 4 Met., 224, he was "distinctly declared to be a tenant at will, and was held "liable for use and occupation during the time of his "actual occupation, and this court has continued to "call such an occupant a tenant at will ever since. "Foley vs. Wyeth, 2 Allen, 131; Towne vs. Butter-"field, 97 Mass., 105, etc."

Lyon vs. Cunningham, 136 Mass., 532, 538.

The possession of a tenant at will is the possession of the lessor.

Denn d. Warren, vs. Fearnside, 1 Wils (C. Pl.), 176.

This is but part of the general rule that the "pos-

"session of the tenant is the possession of the land-"lord."

Sedgwick & Wait, Trial of Title to Land, § 751.

Bedell vs. Shaw, 59 N. Y., 49.

Mont. Rev. Stats., 1879, c. 2. § 37.

"When the relation of landlord and tenant has existed between any persons, the possession of the tenant is deemed the possession of the landlord until the expiration of five years from the termination of the tenancy." * * *

B. The Colorado and Montana Smelting Company are in possession of the premises in controversy at any rate by the license of the plaintiffs. Mrs Wolverton expressly says that the company is there with her consent (Transcript, p. 42), and Williams, the manager of the company, testifies (Transcript, p. 51) that *after* the covenant he considered the company to be in the same position as before.

Bringing this suit in the name of the plaintiffs, as already mentioned, is another important fact, showing the *animus* with which the company held possession. Moreover, the legal effect of the covenant for a conveyance is held by the Supreme Court of the United States to be to make the possession of the vendee that of a licensee. "The case comes within the category of a "license. In such cases the vendee cannot dispute the "title of the vendor any more than the lessee can ques-"tion the title of his lessor."

Burnett vs. Caldwell, 9 Wall. 290.

There is such a privity of estate between the actual occupant of the land and the plaintiffs that, in respect to the possession, there is between them an identity or subordination of interests, and "the posses-

"sion of one, the occupant, becomes, as in the case of "co-tenancy, the possession of the other, through the "principle of agency or trust."

Sedgwick & Wait, Tr. Tit. to Land §751.

It is to be observed that in cases of occupation by a vendee under a contract for ultimate conveyance, the question that almost always arises is whether the possession of the vendee is adverse to his vendor in such a sense that it will ripen into absolute title after the lapse of the statutory period of time. Decisions therefore upon this question that hold the possession to be not adverse, but in privity with the vendor, are authorities in favor of the proposition that the possession of the company in the case at bar is identical with the possession of the plaintiffs.

"There can be no doubt that a person entering "upon land under a contract of purchase, unperformed "on his part, does not hold adversely to the vendor."

Briggs vs. Prosser, 14 Wend. 227.

"It is too well settled to be disputed that one who "enters upon land under a mere agreement to purchase "does not hold adversely as against the vendor until "his agreement has been fully performed, so that he "has become entitled to a conveyance."

In matter of Parks, 73 N. Y. 560, 566.

Clearly, therefore, until performance of the consideration and all other duties on its part by the company, its occupation would not be adverse to the plaintiffs.

The consideration expressed in the covenant was the payment of one dollar, "and the further considera- "tion of said company prosecuting to a successful con- "clusion, the cause of J. R. Clark, adm'r etc. vs. Silas "F. King, now pending in the district court in and for "Silver Bow county."

There is no direct testimony to prove that said cause ever was "prosecuted to a successful conclusion"; there is no evidence to show how it was terminated or that it ever came to such termination as would bar all appeals to a higher court.

It is summitted that until this point is proved by direct and conclusive testimony, the company, being in possession "under a contract of purchase, unperformed "on its part, does not hold adversely to the vendor."

But it is assumed by the Supreme Court of Montana that the consideration mentioned in the covenant had been "paid," and that the company stood in a position to compel a conveyance from the plaintiffs.

It becomes necessary, therefore, to consider the position of the company in this point of view. Notwithstanding the fact that there was no intentional hostility in the possession of the company, did performance of the consideration produce the legal effect of making that possession adverse, *ipso invito?*

In the *dicta* of judges, repeated over and over again in cases where it is no part of the actual decision, it is said that the purchaser's "possession, *so long as* "*the purchase money remains unpaid*, is held to be in "subordination to the title of the vendor."

It is submitted that this qualification, as a general rule not an essential part of the judgment, is needless and in conflict with the true principle, which is enunciated as follows in two well considered Virginia cases:

"The holder and claimant of property under an "equitable title derived from a vendor or grantor, who "retains the legal title for future conveyance, does not "hold adversly, but in subordination to the grantor's "title, and no length of possession will ripen into a "legal title."

Nowlin vs. Reynolds, 25 Gratt. 137, 141.

"In all these cases of vendee who has no deed, of "lessee, mortgagor, *cestui que trust, etc.*, where one is in "under the owner of the legal title, a privity exists "which precludes the idea of a hostile, tortious, wrong-"ful possession, which could silently ripen into a title "by adverse possession under the statute of limi-"tations."

Clarke vs. McClure, 10 Gratt. 305, 314.

These decisions are in harmony with the true doctrine of adverse possession and the general theory as to hostile intention, which is laid down in cases innumerable.

See Angell on Limitations, §§ 384, 390.

The language of Chief Justice Marshall in an early case is very strong to the same effect:

"It would shock that sense of right which must "be felt equally by legislators and by judges, if a pos-"session which was permissive, and entirely consistent "with the title of another, should silently bar that "title."

Kirk vs. Smith, 9 Wheat. 241, 288.

See also,

Zeller's Lessee vs. Eckert, 4 How. 289, 296.

"The possession of no person can be adverse to "the title of the true owner, unless the person *intends* "it to be adverse to that title."

Stamper vs. Griffin, 20 Georgia, 312, 321.

"The question of adverse possession is, therefore, "peculiarly one of intention. That it is the *intention* to "claim title, which makes the possession adverse, is the "doctrine upon which all the cases proceed."

Ormond vs. Martin, 37 Ala., 578, 603.

"It is a familiar rule of law that there can be but "one actual seizin of an estate; that possession follows

"the title in the absence of any possession adverse to "it, and as a result of these two principles, that the "rightful owner of land is deemed to have the posses- "sion until he is ousted from it or disseized."

Sedgwick & Wait, Tr. Tit. to Land, § 728.

It has been shown that the possession of the Colorado and Montana Smelting Company was for more than two years in subordination to the title of the plaintiffs, as evidenced by the acceptance of the covenant for conveyance among other facts, so that during all this time the rightful owner was "deemed to have "the possession."

This possession of the rightful owner continues until he is ousted from it, and in the case at bar there has been no ouster by the company, because there has been an entire absence of intention to make the occupation of the company adverse to the plaintiffs.

"The declarations or admissions of the tenant, "showing an absence of an intent to appropriate, or a "purpose on his part in acquiring or retaining the pos- "session, consistent with the rights of the true owner "of the land, are competent evidence to show the "character of the possession, and that it lacks the "essential element of being hostile."

Sedgwick & Wait, Tr. Tit. to Land, § 758.
Sailor vs. Hertzogg, 2 Pa. St., 182.
Wood, Landlord and Ten., 43.

So, in Briggs vs. Prosser, 14 Wend., 227, the court say: "After performance [by the vendee] and an "equitable title to the premises acquired, I see no rea- "son why his possession may not become adverse. * " * * *Whether it were in fact adverse or not, would "depend upon the circumstances in each particular case."*

In the present case, Mr. Williams, manager of the company, expressly testifies: "We were in possession

"before [the covenant] and have been ever since; *we "are in the same position as we were before*,"—that is, the possession of the company continued to be in subordination to the plaintiffs.

In concluding this branch of the argument, it may be remarked that every presumption should be made in favor of holding the company's possession to be in subordination to the plaintiffs, by reason of the following statutory provision:

Mont. Rev. Stats. c. 2. §32.

"In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property is presumed to have been possessed thereof within the time required by law, and the occupation of the property by any other person is deemed to have been under and in subordination to the legal title, unless it appear that the property has been held and possessed adversely to such legal title for five years before the commencement of the action."

The occupation of the property by the Colorado and Montana Smelting Company must be "deemed to "have been under and in subordination to the legal "title" of the plaintiffs, and the plaintiffs, being "in "possession, by themselves or their tenant, of real "property," have the right and capacity to maintain this action.

III.

In any view of the case, the non-suit was improper. The question whether the possession of the company was adverse or in subordination to the plaintiffs depended upon the intention of the possessor, and was a question of fact which it was for the jury to determine. "Whether the possession in fact is

"adverse, or is under the owner's title, is one for the "jury, with this limitation, that the burden of showing "the possession to have been adverse is upon the party "showing it."

3 Washb. Real Prop. (4th ed.), 141.
Angell on Limitations, 39 ·.
Sailor vs. Hertzogg, 2 Pa. St., 182, 187.
Nowlin vs. Reynolds, 25 Gratt., 143.

It is error to grant a non-suit on the ground of insufficiency of the evidence to show prior possession as against the defendant, where there is *some* evidence tending to show such prior possession. Whether the evidence is sufficient to support the plaintiffs claim is "for the jury, not the court, to decide."

Sharon vs. Davidson, 4 Nev., 416.
McKee vs. Green, 31 Cal., 418.

Every fact is considered as proved, if the evidence *tended* to prove it. "In considering the correctness "of the ruling of the court on the motion for a non-suit, "we must accept as proven every fact which the evi- "dence tended to prove, and which was essential to be "proven, to entitle the plaintiff to a recovery upon the "cause of action stated in the complaint."

Dow vs. G. & C. S. M. Co., 31 Cal., 629, 650.
Lebanon M. Co. vs. Con. Rep. M. Co., 6 Colo., 371, 381.
Drakely vs. Gregg, 8 Wall., 242.
Proffatt on Jury Trial, §355.

In this class of cases, moreover, a non-suit is improper, because it is for the jury to determine whether the plaintiff has established his claim to the mining ground or not.

If neither party shall establish his claim, the suit must be dismissed; U. S. Stats. 1881, c. 140, provides

"that if, in any action brought pursuant to section 2326 of the Revised Statutes, title to the ground in controversy shall not be established by either party, *the jury shall so find*, and judgment shall be entered according to the verdict."

Jackson vs. Roby, 109 U. S. 440.

The judgment granting the non-suit should be reversed and the cause remanded.

EDWARD O. WOLCOTT,

Attorney for Plaintiffs in Error.

No......

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, A. D. 1885.

EVA JANE WOLVERTON AND WILLIAM ARTHUR WOLVERTON, infant heirs of the late Nelson Wolverton, deceased, by Margaret J. Wolverton Daniels, their guardian and next friend, and Margaret J. Wolverton Daniels,

Plaintiffs in Error,

vs.

ERASTUS A. NICHOLS AND CHAS. O. FULLER,

Defendants in Error.

No. 311.

Brief for Plaintiffs in Error.

EDWARD O. WOLCOTT,

Attorney for Plaintiffs in Error.

119/485

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

EVA JANE WOLVERTON *et al.*,
Plaintiffs in Error,
vs.
ERASTUS A. NICHOLS AND CHARLES O. FULLER, *Defendants in Error.*
} No. 67.

In Error to the Supreme Court of Montana.

BRIEF FOR DEFENDANTS IN ERROR.

This case is so fully stated in the brief of the counsel for plaintiffs in error, that it is unnecessary to make any further statement.

The real question is, did the Court below err in overruling the motion to set aside the non-suit?

The suit was brought under Section 354, of the Code of Civil Procedure of Montana, which is in these words:

> "An action may be brought by any person in possession, by himself or his tenant, of real property, against any person who claims an estate or interest therein adverse to him for the purpose of determining such adverse claim, estate or interest."

The complaint alleged possession in the plaintiffs. The answer expressly denied the allegation.

On the trial there was no proof of the possession in the plaintiffs, but on the contrary there was express proof that the possession was in the Colorado and Montana Smelting Company, at the time of the commencement of the suit and from that time up to the trial.

There was no proof that there was any conflict between the claims of the plaintiffs and defendants.

For these reasons the District Court directed a non-suit, and dismissed the case.

The Supreme Court affirmed the judgment.

The language of Section 354, of the Code is so plain that there is no room for doubt. "An action may be brought by any person *in possession*." Possession is one of the material matters, and so it has been repeatedly held.

Lyle vs. *Robbins*, 25 Cal., 437;
Brooks vs. *Calderwood*, 34 Cal., 563;
Sapeloeda vs. *Sapeloeda*, 39 Cal., 13.

Counsel for plaintiffs in error admits that the possession was in the Colorado and Montana Smelting Company, but he undertakes to make out that the Company was the tenant at will, or licensee, of the plaintiff's, and therefore its possession was the possession of the plaintiffs.

Let us see how this is. The record shows that the plaintiffs had sold to the Company the premises in controversy, by a written agreement, of which the following is a copy.

> "Know all men by there presents, that I, Margaret J. Wolverton, widow of Nelson Wolverton, deceased, for myself and as guardian for Eva Jane Wolverton, and William Arthur Wolverton, infants under the age of twenty one years, for and in consideration of the sum of one dollar to me in hand paid by the Colorado and Montana Smelting Company, and the further consideration of said Company prosecuting to a successful conclusion the cause of J. R. Clark adminstrator of the estate of Nelson Wolverton, deceased et al., *vs.* Silas S. King, now pending in the District Court in and for Silver Bow

County, have covenanted and agreed, and by these presents do covenant and agree to convey, by a good and sufficient deed of conveyance, duly acknowledged, all that certain land bounded and described as follows:

"Beginning at a point on the easterly extremity of certain placer mining claims belonging to the estate of the said Nelson Wolverton, and located in Independence Mining District, Silver Bow County, Territory of Montana, in Township No. 3 north, Range No. 8 west, of the principal meridian, which said point is due east from the most southerly point of a certain fence running westerly therefrom along the general course of said Silver Bow Creek; thence in a due west line from said point, touching the most southerly point of said fence, a distance of about thirteen hundred feet, to a point on the westerly extremity of placer mining claim number two hundred and thirty; thence from said point due south along the westerly boundary of said last named placer claim to the most southerly boundary thereof: thence along the most southerly boundary of said placer mining claim and placer mining claims numbers 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241 and 242, in an easterly direction, to the southeast corner of said placer mining claim number two hundred and forty-two; thence in a northerly direction from said corner to the point or place of beginning, it being intended to convey all that part of said placer mining claims numbered from two hundred and thirty to two hundred and forty-two, both inclusive, which lies south of the most southerly point of the fence first above mentioned; to have and to hold the same unto the said The Colorado and Montana Smelting Company, their successors and assigns, for their own benefit and behoof forever.

"In witness whereof I have hereunto placed my hand and seal this 12th day of May, eighteen hundred and eighty-one.

MARGARET J. WOLVERTON. [SEAL.]
MARGARET J. WOLVERTON, [SEAL.]
As guardian for Eva Jane Wolverton and William Arthur Wolverton.

In presence of—
CALEB E. IRVINE.

(Certificate of Notary.)

The record also shows that the consideration for the premises agreed to be given, to wit: the prosecution to a successful conclusion of the case of J. Clark, administrator of *Wolverton* vs. *King*, had been paid. Record, p. 49–51.

The plaintiff, Margaret Wolverton, admits, in her testimony, that the suit is ended and that she has always been ready to make the deed to the company. Record, p. 45.

Under such a state of facts, how can it be said that the Smelting Company is the tenant at will of the plaintiffs; and what is a tenant or an estate at will?

> "Tenant at will is when lands or tenements are let by one man to another, to have and to hold to him at the will of the lessor; by force of which lease the lessee is in possesion. In this case the lessee is called tenant at will, because he hath no certain nor sure estate; for the lessor may put him out at what time it pleaseth him."
>
> 1 Coke on Littleton, 637.

> "An estate at will is where lands and tenements are let by one man to another, to have and to hold at the will of the lessor; and the tenant by force of the lease obtains possession."
>
> 1 Bl. Com., Book 11, p. 146.

> "But every estate at will, is at the will of both parties, landlord and tenant; so that either of them may determine his will, and quit his connection with the other at his own pleasure." Do.
>
> "An estate at will is when one man lets land to another, to hold at the will of the lessor."
>
> 4 Kent Com. 111.

> "An estate at will in lands, is that which a tenant has, by an entry made thereon under a demrise to hold during the joint wills of the parties to the same."
>
> 1, Wash. Real Prop. 503.

"A tenant at will is one who enters into the possession of the lands or tenements of another, lawfully, but for no definite term or purpose, but whose possession is subject to the determination of the landlord, at any time he sees fit to put an end to it. He is called a tenant at will, 'because he hath no certain or sure estate; for the lessor may put him out at what time it pleaseth him'."

Wood, Land. and Tenant 30.

A single suggestion will, as we think, settle this question. If the Smelting Company is the tenant at will, of the plaintiffs, then the plaintiffs, without even notice to quit, can maintain an action of ejectment against the Company.

But who ever heard of an action of ejectment being maintained with or without notice, against a vendee in possession, who had fully paid the purchase money?

We mean successfully maintained, when all the facts were before the court. It may be that in those states where there is no code, it might be necessary to resort to a Court of Equity to make the defence, but when made, either by answer under the codes or by bill in Equity, there could be no recovery in the ejectment.

The counsel for plaintiff in error has made an exceedingly ingenious argument, and has made the very best of a bad case, but with all his research he has not been able to cite a single case where it has been held that a vendee, in possession, under a contract to convey, who has paid his purchase money, was a tenant at will.

There are some cases when a vendee in possession has refused to pay the purchase money and has been sued by the vendor for use and occupation, that the Courts, for want of any better term to characterize the estate have called it an estate at will. But their is a great conflict of authority in these cases. Some comments on them can be found in *Lyon* vs. *Cunningham*, 139 Mass., 532, 538.

There are other cases where the vendee has been in possession, under a contract, and the purchase money, in whole or in part unpaid, where the question was as to the character of the possession, whether *adverse*, in the legal sense or not, and the Courts have called the estate one at will. But our case is of neither of these classes. It is one in which the entire consideration has been paid by the vendee in possession, under a written contract which has been fully performed, and where the complete equitable title has passed and nothing remains to be done except the conveyance of the legal title.

We submit, with entire confidence, that there is no estate at will in the case.

There is another ground upon which the Supreme Court placed its judgment of affirmance, and that is that there is no proof in the record that the ground claimed by the defendants was in conflict with that claimed by plaintiffs.

A careful examination of the evidence will show that this is true. It was certainly necessary to prove that allegation.

Sandiago vs. *Allison*, 46 Cal., 162;
San Francisco vs. *Ellis*, 54 Cal., 73;
Blondell vs. *Williams*, 9 Nev., 191;
King vs. *French*, 2 Saw., 441;
Stark vs. *Stark*, 6 Wall., 192.

There is no error in the judgment below, and it should be affirmed

Nov. 15, 1886.

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Att'ys for Defendant in Error.